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No. 08-1508

In The
Supreme Court of the United States

KYUNG SUH KIM, ET AL.,
Petitioners,

v.

SYNOD OF SOUTHERN CALIFORNIA AND HAWAII, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of California, Second Appellate District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does California Corporations Code 9142(c), as construed and applied by the California Supreme Court, unconstitutionally burden freedom of worship and association in violation of the First Amendment to the United States Constitution?

2. Whether deference to a national denomination's finding of a "schism" or "true church" should be limited to a religious determination and not be adopted by the courts to resolve property ownership disputes.

PARTIES TO THE PROCEEDINGS

Petitioners are Korean Hope Christian Church, a California non-profit corporation; Kyung Suh Kim; Bong Kuck Cha; Jong Min Tae; Chung Yoll Kim; and Chung Sook Kim.

Respondents are Synod of Southern California and Hawaii, a non-profit California corporation; Presbytery of Hanmi, a California non-profit corporation; Korean Hope Christian Church, a California non-profit corporation; and Mark Hong.

Intervenors are Danny Cho and Younghee Cho.

Because neither the State of California nor any agency, officer, or employee thereof is a party to this action, 28 U.S.C. § 2403(b) may apply; this Opposition is therefore being served concurrently on the Attorney General of California.

CORPORATE DISCLOSURE STATEMENT

Respondents Presbytery of Hanmi and Synod of Southern California and Hawaii are California nonprofit religious corporations with no parent corporation or stock.

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INTRODUCTION

Petitioners request that this Court review an unpublished slip decision of an intermediate court that had no precedential effect and considered no federal questions, as Petitioners never presented one. Petitioners do not claim that the decision conflicts with any decision from another state court. Petitioners claim that the lower court made certain rulings which appear nowhere in the record. In sum, the Petition must be denied out of hand because it violates every significant Supreme Court rule governing a request for certiorari.

If this Court determines to review the relative merits of the Petition, the record reflects no constitutional error. This case revolves around the resolution of a schism within the congregation of Korean Hope Presbyterian Church ("Hope Church"). Hope Church was and is a member church of a Presbyterian denomination whose governing documents declare that Hope Church holds its assets in trust for the benefit of the denomination. Petitioners were part of a faction within Hope Church that claimed to have disaffiliated from the national denomination and banished the other faction. Respondents include intermediate governing bodies of the denomination who sued to resolve the schism and enforce the trust.

The trial court resolved the case in favor of the denomination by applying the straightforward neutral principles of law analysis endorsed by this Court in *Jones v. Wolf*, 443 U.S. 595 (1979). It found the property was held in trust by analyzing the deeds to the church's property, the church's governing

documents, the national denomination's governing documents, and relevant state statutes including California Corporations Code § 9142. The trial court also concluded that the denomination had the authority to resolve the congregation's schism. The California Court of Appeal affirmed the trial court in an unpublished decision. The California Supreme Court declined to review the decision.

COUNTERSTATEMENT OF THE CASE

Respondents are governing bodies within the Presbyterian Church (U.S.A.) ("PCUSA") and its officers. The Synod of Southern California and Hawaii (the "Synod") is one of 16 synods (regional districts) within PCUSA, which oversees the Presbytery of Hanmi ("Hanmi Presbytery"), a regional body comprised of member churches. Hope Church is a particular church of PCUSA under the supervision of Hanmi Presbytery. Mark Hong was the moderator of Hanmi Presbytery. The court below correctly described the following relevant background facts.

I. The Constitution of the Presbyterian Church (U.S.A.).

The Constitution of the Presbyterian Church (U.S.A.) (the "PCUSA Constitution") is the governing instrument of PCUSA and all of its particular churches and other governing bodies. (Petitioners' Appendix ("Appendix")-4.)[1] A portion of that PCUSA Constitution called the Book of Order (the "Book of

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[1]The decision of the California Court of Appeal is attached to Petitioner's Appendix at pp. 1-43.

Order") sets forth the doctrine and disciplines of PCUSA. *Id.*

Book of Order § G-9.0402(a) sets forth mandatory procedural and structural rules describing the doctrine, government and organization of all levels within PCUSA. Book of Order § G-9.0101 describes PCUSA's structure as a system of four tiered governing bodies, each with oversight jurisdiction over the subordinate body: the General Assembly, the synod, the presbytery, and the session (the equivalent of a board of directors) of each local church. (Appendix-3, 4.)

Under Book of Order, § G-10.0102, the session of a particular PCUSA church, not the church's pastor, is responsible for the governance of that church. (Appendix-4.) However, neither a session nor a congregation nor a pastor, nor any or all acting together, has authority to remove a particular church from its presbytery or from PCUSA. *Id.* The relationship to PCUSA of a particular church can be severed only by constitutional action by the presbytery. (Appendix-5.) Under Book of Order, § G-8.0201, **"[a]ll property held by or for a particular church . . . is held in trust . . . for the use and benefit of the Presbyterian Church (U.S.A.)."** (Appendix-3, 4; emphasis added.) (This provision of the Book of Order is sometimes referred to herein as the "Trust Clause".)

Under Book of Order, § G-9.0503, each governing body has the authority to establish a supervisory "Administrative Commission" over any subordinate governing body. (Appendix-6.) An Administrative Commission can be vested with a wide range of

powers, including the power to act as the governing body for the subordinate body for which it has been named. *Id.* Therefore, an Administrative Commission for a certain local PCUSA church may properly discharge the church's session and directly assume that responsibility. *Id.*

If there is a schism within the membership of a particular church and the presbytery is unable to effect a reconciliation or a division into separate churches within the PCUSA, the presbytery shall determine if one of the factions is the "true church", entitled to manage the property. (Appendix-5, 6.) This determination does not depend upon which faction received the majority vote within the particular church at the time of the schism. (Appendix-6.)

II. Reverend Kim and Korean Hope Christian Church joined PCUSA.

Petitioner Kyung Suh Kim ("Rev. Kim") became a Presbyterian minister in 1959. *Id.* In 1971, he became a minister member of a presbytery within PCUSA. *Id.* When Rev. Kim joined PCUSA, he was the pastor of Hope Church, which was an independent Presbyterian church. *Id.*

A. After Rev. Kim placed Hope Church's property in his own name, the congregation voted to join PCUSA to prevent Rev. Kim from selling Hope Church's property.

For over 20 years, the title to Hope Church's property was held in the nonprofit corporation's name. Then, in 1990, Rev. Kim unilaterally placed Hope

Church's real property into his own name, transferring it back to Hope Church only after he received a $10,000 property tax bill two years later. (Appendix-8.)

Many congregants knew that Rev. Kim had transferred the property to himself and were afraid that he might sell the property. (Appendix-9.) Therefore, they discussed joining PCUSA because the Trust Clause would protect Hope Church's property from Rev. Kim's whims. *Id.*

The congregants were familiar with the Trust Clause because about 35 congregants and some assistant pastors had recently joined Hope Church from another PCUSA church. *Id.* The congregants frequently met to discuss the PCUSA Trust Clause. *Id.* Following these discussions, in 1995, Hope Church submitted an application to became a particular church within PCUSA and joined the denomination. (Appendix-10.)

Rev. Kim knew that joining PCUSA meant placing Hope Church's property in trust for the benefit of the denomination, pursuant to the Trust Clause. (Appendix-10.) At trial, he admitted that, by having Hope Church join PCUSA, he intended that it would "abide by" and be bound by its Constitution. *Id.* After Hope Church joined PCUSA, Rev. Kim signed a "covenant" that "as God is my witness," he would "abide by the Constitution of the PCUSA". *Id.*

B. A schism at Hope Church compelled the Respondents to file this action.

In the summer of 2001, dozens of Hope Church congregants signed a petition demanding Rev. Kim's

resignation. (Appendix-12.) Rev. Kim removed those congregants from Hope Church membership and began a letter writing campaign to Hanmi Presbytery in which he relied on the Book of Order to justify their removal. (Appendix-13.) In another letter, he demanded that the Book of Order be "faithfully observed". (Appendix-13.) In that letter, he complained that Hope Church had split into factions, with one group meeting out in the park under a new name and collecting and keeping a separate Sunday offering. *Id.*

A few months later, Rev. Kim invited Rev. Oh and his congregation to join Hope Church. Their relationship soured, and Rev. Kim wrote a letter to the Presbytery in January, 2003, complaining that Rev. Oh had breached an agreement to pay Rev. Kim $100,000 and give other consideration as a condition to this merger. (Appendix-14.) At trial, Rev. Kim admitted that, by asserting that he enjoyed standing to seek the Presbytery's intervention, he and Hope Church were "under the jurisdiction of PCUSA" and subject to the rules stated in the Book of Order. *Id.*

In November 2002, Rev. Kim and Hope Church filed a civil complaint against Rev. Oh for breach of contract in the Los Angeles County Superior Court. *Id.* In that action, Rev. Kim expressly admitted that Hope Church was a member of the PCUSA. *Id.* Rev. Kim also filed a complaint within the internal PCUSA court system in December 2002, making similar charges and demanding that the Presbytery intercede. *Id.*

The Presbytery, after several weeks of trying to mediate this dispute, formed the Hope Administrative Commission to resolve the schism, as permitted by Book of Order § G-9.0502, replacing the former Hope

Church session. (Appendix-17.) A few weeks later, Hope Church delivered a notice claiming to have renounced the jurisdiction of PCUSA. *Id*. But, months later, an attorney for Hope Church sent a letter to the Presbytery taking the contrary position that "Rev. Kim has not renounced jurisdiction of the PCUSA". *Id*.

C. Rev. Kim ignored the Hope Administrative Commission and entered into phony transactions to gain advantage over Respondents.

Throughout 2003 and 2004, the Hope Administrative Commission attempted to resolve the problems at Hope Church. As part of those efforts, it invited all congregants and Rev. Kim to come and speak at meetings. Rev. Kim, represented by counsel throughout the process, refused to cooperate. (Appendix-17, 18.) Instead, he signed and recorded what he admitted at trial were multiple fraudulent conveyances of the Hope Church real property, deliberately to frustrate PCUSA. First, he entered into a lease in which the tenant never took possession or paid rent. He did so to "gain advantage" over PCUSA. (Appendix-18.) Then, he signed and recorded a grant deed for the property. At trial, he admitted that the grant deed was a fraud, too, which he signed simply to put the property "beyond the reach of PCUSA". *Id*.

D. Respondents filed suit.

In response to Rev. Kim's actions, Respondents filed suit. (Appendix-18.) In the suit, Respondents sought injunctive orders to establish the denomination's ecclesiastical authority to resolve the Hope Church schism by selecting its "true church"

faction to manage Hope Church. It also sought declaratory relief to quiet title to the Hope Church property pursuant to the Trust Clause.

E. The lower court found for Respondents on all issues tried and entered judgment accordingly.

Following a bench trial, the trial court entered its statement of decision in favor of Respondents, which was carried forward into a declaratory judgment that all of Hope Church's property was held in trust for the use and benefit of PCUSA. (Appendix-19.) The trial court also ruled that the management of Hope Church was subject to the direction of the Hope Administrative Commission and enjoined Petitioners from interfering with Respondents' management of Hope Church's property. (Appendix-20.)

F. Petitioners appealed the trial court's decision, and the California Court of Appeal affirmed the decision.

In their appeal to the California Court of Appeal, Petitioners raised three issues:

1. That Respondents failed to prove that a trust existed in favor of the PCUSA (Appendix-21; Appellants' Opening Brief at Respondents Appendix ("RA"), RA-26b);

2. As a matter of law, Hope Church had the power to leave the PCUSA, and once it had done so, the PCUSA did not have secular power over Hope Church (Appendix-21; Appellants' Opening Brief, see RA-42b); and

3. Appellants were denied due process as there was no right to be heard as required by the Book of Order (Appendix-21: Appellants' Opening Brief, see RA-50b).

The California Court of Appeal found in favor of Respondents on all issues. (Appendix-2.) On September 29, 2008, Petitioners sought review by the California Supreme Court. On November 12, 2008, the California Supreme Court granted review but deferred briefing pending its decision in *Episcopal Church Cases*, 45 Cal.4th 467 (2009). On March 11, 2009, the California Supreme Court dismissed review and remanded this case back to the California Court of Appeal. (Appendix-44.)

REASONS FOR DENYING THE PETITION

I. This Court Should Deny the Petition out of Hand Because No Federal Issues Were Presented Below.

A. The issues presented in the Petition were neither presented to, nor addressed by, the California Court of Appeal.

Absent extraordinary circumstances, this Court will not review a state court judgment unless the Petitioners affirmatively demonstrate that they are raising a federal claim that was "either addressed by, or properly presented to, the state court that rendered the decision". *Adams v. Robertson*, 520 U.S. 83, 86 (1997), see also *Howell v. Mississippi*, 543 U.S. 440, 443 (2005); 28 U.S.C. § 1257. Petitioners must therefore (1) specify the stages in the proceedings in the trial court and appellate court when the federal

question was raised; (2) state how the federal question was raised and how the state court ruled on it; and (3) identify the portion of the record where the federal question was raised. Sup. Court Rule 14(g)(i). As shown immediately below, no such claim was either "addressed by, or properly presented to," the lower court.

1. The issue of the constitutionality of California Corporations Code § 9142(c) was neither presented to nor addressed by the state court.

Petitioners first argue that this Court should determine the constitutionality of a certain California statute, California Corporations Code § 9142(c) ("Section 9142(c)"). (Petition, p. 6.) Petitioners did not raise this issue below. (RA-1b-52b.) Instead, the Petitioners asked the California Court of Appeal to determine if Respondents satisfied their burden of proof in establishing a trust over Hope Church's property. (RA-26b-42b.) In their Reply Brief below, Petitioners sought to belatedly argue that California Corporations Code § 9142(a), not Section 9142(c), violated the First, Fifth and Fourteenth Amendments to the United States Constitution. (RA-73b-74b.) California law prohibited the Court of Appeal from considering issues raised for the first time in a reply brief. *Varjabedian v. City of Madera*, 20 Cal.3d 285, 295, n. 11 (1977) ("Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant."). Therefore, the issue of the constitutionality of Section 9142(c) was not "properly presented" below, as required by *Adams*. Nor was it "addressed by" the unpublished decision, which

never discusses any constitutional challenges to either Section 9142(a) or Section 9142(c).

2. The California Court of Appeal was neither presented nor addressed the issue of whether or not deference to ecclesiastical authorities in church property disputes violates the First Amendment.

Petitioners' next two arguments take the position that the First Amendment precludes a court from allowing ecclesiastical determinations by a church tribunal to decide real property disputes. (Petition, pp. 13-17.) Again, Petitioners never raised this issue in their Opening Brief and did not "properly" present that argument to the California Court of Appeal, as required by *Adams*. (RA-1b-52b.) In their Reply Brief below, Petitioners belatedly made at least a similar claim, that deferring to a hierarchical church's determination of the true church to **control** a church violates the First Amendment. (RA-72b.) The decision of the California Court of Appeal did not address the constitutional issue.

B. The unpublished decision at issue did not resolve important federal questions.

Normally, this Court will only grant a petition for writ of certiorari challenging a state court decision if the state court "decided an important federal question in a way that conflicts with another state court of last resort or of a United States court of appeals." (Sup. Ct. R. 10(b).) Petitioners do not cite to any federal question this case decided, nor to a single case outside of

California with which the unpublished opinion conflicts.

The opinion did not address an important federal question, because none was presented to the California Court of Appeal. Directly to the contrary, the state court ordered that its opinion be unpublished pursuant to California Rules of Court, rule 8.1115(a), which means that the opinion cannot be cited by either a court or a party in any other action. Under California law, the California Supreme Court is given the authority to provide for the publication of Court of Appeal opinions as it deems appropriate. (*Cal. Constitution*, Article VI, § 14, see also *Cal. Govt. Code* § 68902.) The selective publication rule allows the California Supreme Court to oversee the orderly development of cases as law, as "most opinions do not change the law." *Schmier v. Supreme Court of California*, 78 Cal. App.4th 703, 711 (2000), *cert. den.* 531 U.S. 958 (2000).

A California Court of Appeal opinion is suitable for publication if it establishes a new rule of law, modifies an existing rule of law, applies an existing rule of law to a set of facts significantly different from those in published opinions. (California Rules of Court, rule 8.1105(c), see also *Schmier*, 78 Cal.App.4th at 710-711.)

By ordering the decision to be unpublished, the California Court of Appeal recognized that its decision was a factually driven, straightforward application of neutral principles of law that did not change existing law nor resolved any important issues of either federal or state law.

II. Even If this Court Reviews the Merits, it Should Deny the Petition.

A. Corporations Code § 9142(c) is constitutional.

To the extent that Petitioners seek to mount a facial challenge to the validity of Section 9142(c), they bear a "heavy burden" and "must establish that no set of circumstances exist under which the [Act] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). It certainly is not a burden that Petitioners can satisfy with respect to Section 9142(c).

Section 9142(c) allows the assets of a religious corporation to be held in trust if the governing documents of its general church so provide:

> (c) No assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law unless one of the following applies:
>
> (1) Unless, and only to the extent that, the assets were received by the corporation with an express commitment by resolution of its board of directors to so hold those assets in trust.
>
> (2) Unless, and only to the extent that, the articles or bylaws of the corporation, or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide.

> (3) Unless, and only to the extent that, the donor expressly imposed a trust, in writing, at the time of the gift or donation.

Petitioners claim that Section 9142(c) unconstitutionally burdens freedom of worship, because it allows a hierarchical church to impose a trust over a church's property even if the church is "independent or congregational," which Petitioners claim describes Hope Church. (Petition, p. 11.)

A "hierarchical" church is a legal term of art. It simply means a denomination in which the local congregations are members of a larger religious organization and under its government and control. *Watson v. Jones*, 80 U.S. 679, 726-727 (1871). In contrast, a congregational church is one in which the local churches are strictly independent. *Watson*, 80 U.S. at 722. Respondents are a "hierarchical" church, with its churches organized in ascending order from the local church sessions, to the regional presbytery, to its supervising synod, all under the governing General Assembly. *Presbyterian Church in the United States v. Hull*, 393 U.S. 440, 441-442 (1969).

Petitioners' argument is circular. They argue that Section 9142(c) allows a hierarchical church to create a trust over a congregational church's property, which violates the First Amendment. Yet, section 9142(c)(2) only concerns trusts that are explicitly mentioned in the governing documents of the "superior religious body or the general church", i.e. a national or hierarchical church. Therefore, by its own terms, Section 9142(c) applies only to "hierarchical" churches, not congregational churches. Consequently, Section 9142(c) cannot be used to impose a trust over a

congregational church's property. In making that argument, Petitioners claim that Hope Church is a congregational church. They ignore the fact that the lower courts held that Hope Church is a particular church of PCUSA, which has repeatedly been declared in *Hull* and other opinions to be a "hierarchical" church.

1. The California Supreme Court recently held that Section 9142 does not infringe on First Amendment Rights.

When a court uses a neutral principles of law approach, it looks to sources of law including state statues governing church property:

> The neutral-principles approach was approved in *Maryland & Va. Churches, supra,* an appeal from a judgment of the Court of Appeals of Maryland settling a local church property dispute on the basis of the language of the deeds, the terms of the local church charters, the **state statutes governing the holding of church property**, and the provisions in the constitution of the general church concerning the ownership and control of church property.

Jones, 443 U.S. at 602-603 (emphasis added).

The California Supreme Court recently held that Corporations Code § 9142 "is fully consistent with *Jones v. Wolf* [citation omitted], and promotes the free exercise right of persons to form and join a religious association that is constructed and governed as they choose." *Episcopal Church Cases*, 45 Cal.4th 467, 492 (2009). The California Supreme Court also held that

Section 9142 was the special type of state statute to resolve church property disputes that Justice Brennan contemplated in his concurring opinion in *Md. & Va. Churches v. Sharpsburg*, 396 U.S. 367 (1970):

> A third possible approach is the passage of special statues governing church property arrangements in a manner that precludes state interference in doctrine. Such statutes must be carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies.

Md. & Va. Churches, 396 U.S. at 370. (conc. opn. of Brennan, J.), cited in *Episcopal Church Cases*, 45 Cal.4th at 488.

In this case, the California Court of Appeal did not evaluate the constitutionality of Section 9142(c). However, the California Supreme Court has held in a different case that Section 9142(c) does not violate the First Amendment.

2. Section 9142(c) promotes free exercise of religion by accommodating hierarchical churches.

The governing documents of many (but not all) organized denominations declare that the property of their local churches is held in trust for the benefit of the denomination. Section 9142(c) accommodates that practice, as the California Supreme Court stated in *Episcopal Church Cases*, 45 Cal.4th at 488:

> Section 9142 [of the Cal. Corporations Code], subdivisions (c) and (d) does not permit state

> interference in religious doctrine and leaves control of ecclesiastical policy and doctrine to the church. Subdivision (c), of that section permits the governing documents of the general church to create an express trust in church property. . . .

This Court in *Jones* approved steps by denominations to ensure that "the faction loyal to the hierarchical church will retain the church property" or that the church property will be retained by the "denominational church." *Id.* For this reason, the neutral principles standard cannot be said to "frustrate the free-exercise rights of the members of a religious association." *Id. Jones* explicitly required states to provide methods whereby a minority loyal to the general church could establish rights to church property, including through "the corporate charter or constitution of the general church." *Id.* at 606. *Jones* requires that hierarchical control of church property, while not "foreordained," must be at least one possible outcome in order for state property laws to survive constitutional scrutiny. *Id.*, 443 U.S. at 607-608.

A hierarchical church cannot be a viable authority consistent with its own governing principles if it is unable to retain a place of worship for its congregants in the face of a doctrinal dispute. For citizens to be allowed to exercise their First Amendment right to choose to worship in a hierarchical religious denomination, where record title to church property is held in the name of the local church, there must be rules such as Section 9142 that allow the general denomination to control church property. By trying to invalidate Section 9142(c), Petitioners seek to eliminate the distinction between a congregational

church and a hierarchical church that allows its local churches to hold title to their property–i.e. PCUSA. Such a rule would make it impossible for hierarchical churches, allowing title in the name of the local church, such as PCUSA, to control the property of a local church. Invalidating Section 9142(c) would force many hierarchical churches–i.e. PCUSA–to change their polity by requiring title to the property of the local churches to be held in the name of a higher governing body of the hierarchical church. In short, rather than violating Petitioners' rights of freedom of worship and association under the First Amendment, Section 9142(c) protects the free exercise rights under the First Amendment of citizens who choose to worship in hierarchical churches where record title to church property is held in the name of the local church.

3. The fact that Hope Church was independent until 1995 does not somehow make Section 9142(c) violate the First Amendment.

In their statement of the case, Petitioners claim that, since Hope Church was only briefly associated with PCUSA, Section 9142(c) "unconstitutionally burdens freedom of worship and association in violation of the First Amendment" because it prevents Hope Church from disaffiliating and taking the property. (Petition, p. 12.) Petitioners never explain how Section 9142(c) prevented them from exercising their free exercise right or right of assembly. Section 9142(c) does not prevent a single person from leaving PCUSA and affiliating with another church or worshiping in any manner that person sees fit. Instead, Section 9142(c) protects the free exercise

rights of the members generally who have chosen a hierarchical church polity.

Petitioners also contend that it would be unfair to enforce Section 9142(c) in this case, because Hope Church was unaware of the Trust Clause. The record contradicts that assertion. The record shows that, before joining PCUSA, the congregants of Hope Church and Rev. Kim knew of the Trust Clause and that Hope Church could not leave PCUSA with its property once Hope Church joined PCUSA. The congregants voted to affiliate with PCUSA specifically because the Trust Clause would prevent Rev. Kim from transferring Hope Church's property to his name. As a result, this "unfairness" argument is not supported by the record and does not provide a ground to grant the Petition.

B. Petitioners' claim that deference to ecclesiastical decisions in property disputes violates the First Amendment is not only wrong but also misstates the record below.

Petitioners argue that the Petition should be granted so this Court can determine "whether deference to a national denomination's finding of a 'schism' or 'true church' should be limited to a religious determination and not be adopted by secular courts to resolve property ownership disputes, in light of the limitations imposed by the First Amendment to the United States Constitution." (Petition, p. 8.) Petitioners make two arguments to support their contention. First, they argue that the lower court's application of neutral principles of law improperly deferred to Respondents' identification of the true

church. Second, they argue that the lower court improperly deferred to true church identification when it held that Respondents were entitled to control Hope Church's property.

1. The courts below applied the neutral principles of law test without deferring to any ecclesiastical decisions made by PCUSA.

California courts have long applied the *Jones* neutral principles of law test to resolve church property disputes by analyzing the deeds, the local church's bylaws and articles of incorporation, the general church's governing documents, and state statutes. By contrast, "if the civil court is required to resolve a religious controversy, it must then defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body". *Korean United Presbyterian Church v. Presbytery of the Pacific*, 230 Cal.App.3d 480, 498 (1991), disapproved in part on other grounds in *Morehart v. County of Santa Barbara*, 7 Cal.4th 725 (1994).

Both the California Court of Appeal and the trial court applied the neutral principles test to determine that Hope Church held its property in trust for the benefit of PCUSA. The California Court of Appeal noted that the deeds to Hope Church's real property were in the church's name, not PCUSA, though Rev. Kim admitted that he had repeatedly transferred record title for no consideration at his whim. (Appendix-28.) By the same token, the failure of Hope Church's bylaws and articles of incorporation to refer to PCUSA was irrelevant due to the fact that Rev. Kim

ignored all corporate formalities, seeking to maintain absolute control over Hope Church. (Appendix-28, 29.)

The California Court of Appeal concluded that the congregants of Hope Church voted to join PCUSA specifically because the Trust Clause prevented Rev. Kim from owning or selling Hope Church's property. (Appendix-29, 30.) Contrary to Petitioners' assertion, Hope Church joined PCUSA knowing that its property would be held in trust for the benefit of PCUSA.

Next, the lower courts analyzed Section 9142(c) and concluded that Section 9142(c) read in conjunction with Book of Order § G-8.0200 created a trust over Hope Church's property in favor of PCUSA. (Appendix-30-32.) It made that determination based on the plain meaning of the language in Section 9142(c) and Book of Order § G-8.0200 without deferring to any ecclesiastical determinations on polity or doctrine made by Respondents.

Based on that neutral principles of law analysis, the lower courts concluded that Hope Church held its property in trust for PCUSA. As a result, the lower courts quieted title of that property in favor of Respondents. The lower courts did not defer to any ecclesiastical determinations in holding that Respondents were entitled to possession of Hope Church's property. The California Court of Appeal did not commit the error that Petitioners allege.

2. Even if the lower courts deferred to Respondents' identification of the true church to resolve this dispute, the First Amendment requires that deference.

Petitioners urge this Court to prohibit states from deferring to any ecclesiastical determination in church property cases. Petitioners argue that a hierarchical church will "always win" property disputes by declaring a schism exists. (Petition, p. 15.) To support that argument, Petitioners primarily rely on an overturned California Court of Appeal case--*California-Nevada Annual Conference v. St. Luke's United Methodist Church*, 121 Cal. App.4th 754 (2004), disapproved by *Episcopal Church Cases*, 45 Cal.4th at 491-492 (2009).

This Court has consistently disagreed with the Petitioners' proposition of no deference to any ecclesiastical determination in church property cases because the Free Exercise Clause of the First Amendment requires such deference. See, e.g., *Kerdoff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 120-121 (1952). In *Kerdoff*, this Court held that in some instances courts must defer to ecclesiastical decisions of hierarchical churches to resolve church property cases:

> There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition of property. Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls. [n. omitted] This under

> our Constitution necessarily follows in order that there may be free exercise of religion.

Kerdoff , 344 U.S. at 120-121.

Similarly, courts applying a neutral principles of law analysis in certain circumstances must defer to ecclesiastical decisions:

> [T]here may be cases where the deed, the corporate charter, or **the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property**. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court **must defer** to the resolution of the doctrinal issue by the authoritative ecclesiastical body.

Jones, 443 U.S. at 604 (emphasis added).

Further, states can also use a rule of mandatory deference to religious authority to resolve church property disputes as this Court announced one hundred years earlier in *Watson v. Jones*, 80 U.S. 679 (1871). *Jones* 443 U.S. at 608-609. In reliance on *Jones*, the California Supreme Court recently held that if resolution of a church property dispute involves "a point of doctrine, the court must defer to the position of the highest ecclesiastical authority that has decided the point." *Episcopal Church Cases*, 45 Cal.4th at 485. The rule urged by Petitioners would require this Court to modify or overrule its opinions in at least *Watson*, *Kerdoff*, *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), and *Jones*.

In any event, the record below does not support Petitioners' claim. Here, the lower court did not defer to the denomination's ecclesiastical decisions in enforcing the Trust Clause. As these cases demonstrate, it could have done so, but it did not. Rather, it applied the neutral principles analysis in resolving the state of title to Hope Church, and only deferred to the denomination's determination of which faction of this broken church was the "true church".

3. The California Court of Appeal deferred to the Respondents' true church identification in affirming the trial court's issuance of an injunction to enjoin Petitioners from interfering with Respondents' management of the Hope Church real property.

Petitioners concede that civil courts must defer to a hierarchical church's determination of "religious" issues (Petition, p. 14), but argue that courts below erred when they deferred to the denomination's determination of the "true church", because "proper application of neutral principles" allowed Hope Church to withdraw from PCUSA (Petition, p. 17). Petitioners misstate both the record below and the law.

a. The First Amendment requires courts to defer to a hierarchical church's determination of the identity of the "true church".

The California Court of Appeal concluded that the question of whether or not Hope Church had "left" PCUSA had no bearing on the disposition of the Hope Church's property because it ruled that Hope Church

held its property in trust for PCUSA. (Appendix-38.) The question of whether Hope Church could secede from PCUSA was relevant to the injunctive relief requested by Respondents to **control** Hope Church's real property: "Instead, the issue is how to resolve claims of competing portions of church membership to be the true church . . . ." (Appendix-40.)

The lower court's ruling directly follows cases such as *Serbian Orthodox Diocese*, in which this Court held that civil courts must accept an ecclesiastical tribunal's decisions:

> In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over **the government and direction** of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.

Serbian Orthodox Diocese, 426 U.S. at 724-725 (emphasis added).

When a church is in schism, it presents a "significant complicating factor" that requires a different form of analysis than cases that involve only the secession of an entire local church. *Jones*, 443 U.S. at 606-607. California courts also have long held that when a church within a denomination is in schism, "the identification of a religious body as the true church is an ecclesiastical issue." *Korean United*, 230

Cal. App.3d at 500; see, also, *Metropolitan Philip v. Steiger*, 82 Cal.App.4th 923, 931 (2000); *Concord Christian Center v. Open Bible Standard Churches*, 132 Cal.App.4th 1396 (2005); *New v. Kroger*, 167 Cal. App.4th 800, 827 (2009).

Here, the lower courts were confronted with a classic church schism. Rev. Kim sued Rev. Oh both in civil court and in the ecclesiastical courts. Some Hope Church congregants demanded that Rev. Kim resign, he then unilaterally "excommunicated" them from the denomination, and they were forced to start a church in exile, holding services in local a park. (Appendix-13.) As a result, Hope Church became ungovernable. To bring peace to Hope Church, Respondents organized an administrative commission under Book of Order, § G-9.0503 and tried unsuccessfully to reconcile the factions. It therefore acted under Book of Order § G-11.0103(i) and identified the true church of Hope Church to resolve the dispute over the management of Hope Church.

Here, the California Court of Appeal, citing *Serbian Orthodox Diocese*, held that the determination of which faction of Hope Church was the "true church" presented an issue of religious doctrine, polity and administration. (Appendix-40, 41.) It therefore deferred to the Hope Administrative Commission's determination of the true church, held that faction was entitled to **manage** Hope Church's property, and affirmed the trial court's decision to grant the injunctive relief. *Id.*

Petitioners never explain why or how judicial deference to a hierarchical church's determination of the identity of a true church violates any provision of

the United States Constitution. They cannot, because the First Amendment demands such deference. As a result, this Court should deny the Petition.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Court deny the Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

CASE NO. B191806

[Filed May 16, 2007]

SYNOD OF SOUTHERN CALIFORNIA AND HAWAII, etc., et al.	)
Plaintiffs and Respondents,	)
-vs-	)
Kyung Suh Kim, et al.,	)
Defendants and Appellants.	)

Appeal from the Superior Court of California
County of Los Angeles
Case No. BC308786
The Honorable Lee Smalley Edmon

APPELLANT'S OPENING BRIEF

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Court of Appeal
State of California
Second Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
California Rules of Court, Rule 14.5

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Synod of Southern California and Hawaii, et al. V Kyung Suh Kim, et al.

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/s/

Printed Name: Randal M. Penner, Penner, Bradley & Buettner
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State Bar No.: 101201
Party Represented: Appellants and Defendants

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Defendants and Appellants Korean Hope Christian Church, Kyung Suh Kim, Bong Duck Cha, Jong Min Tae, Chun Yoll Kim, and Chung Sook Kim ("Appellants" or "Hope Church") submits the following as their Opening Brief

I

INTRODUCTION AND SUMMARY OF THE CASE

This case presents the issue of what occurs to real property interests where the local church, an autonomous California corporation, is the legal owner of its property, later joins a religious denomination, the Presbyterian Church of the United States of America ("PCUSA") and then terminates its affiliation with that denomination. This case presents the further issue of what occurs when the local church disaffiliates with the denomination which subsequently invokes provisions in its own rules and attempts to take over the local church and its property.

Respondents filed this action, claiming that they were entitled to a trust interest in the property owned by Hope Church and claiming they had the right to take over the corporate entity called Hope Church and control the church and its property, in disregard of California corporate rules.

The Superior Court issued its Statement of Decision on March 22, 2006, incorporating the Decision into its June 13, 2006 Judgment. (CT 962, 1270)

As set forth more fully below, that decision is in error for a number of reasons:

1. No trust existed because it was never created;

2. Hope Church was legally entitled to disaffiliate with the PCUSA and by so doing, the PCUSA has no power to control Hope Church;

3. Any action taken by the PCUSA to take over and gain title to Hope Church's property is a disguised implied trust not permitted by California law;

4. Taking over Hope Church's property by establishing an "Administrative Commission" without giving notice to Hope Church and without a hearing for Hope Church, and then using the Courts to enforce that action is a denial of due process and a violation of the Establishment Clause of the First Amendment; and

5. Because of the foregoing, the injunctive prohibition in the ruling against the individual Board of Directors is in error.

II

PROCEDURAL HISTORY

On January 7, 2004 a complaint was filed by the Synod of Southern California and Hawaii, Presbytery of Hanmi, Korean Hope Christian Church and Mark Hong against Korean Hope Christian Church, Kyung Suh Kim, Dong Duck Cha, Jong Min Tae, Chun Yoll

Kim, and Chung Sook Kim[1] The complaint alleged and sought enforcement of an express trust, breach of fiduciary duty, declaratory relief to enforce the terms of constructive trust, and accounting of assets, quiet title, conversion, intentional misrepresentation, rescission, and avoidance of fraudulent transfer. (CT 19)

In essence, the case is about the take-over of a California corporation, Korean Hope Christian Church ("Hope Church") by a subsidiary of the Presbyterian Church ("PCUSA"). It was alleged that Hope Church had joined the PCUSA and became subject to its constitution ("the Book of Order"), It was further alleged that Hope Church had ineffectually withdrawn from the PCUSA, a PCUSA Administrative Commission had been appointed, the Administrative Commission had declared a "schism" in Hope Church, a trust in favor of the PCUSA existed, and the Administrative Commission was entitled to take over Hope Church and to own its property.[2] The complaint further alleged that the members of the Board of Directors of Hope owed a fiduciary duty to the PCUSA pursuant to the Book and that those duties were breached. All other causes of action flow from those

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[1] Other parties were named as defendants in this action. However, over time they were dismissed from the case. The relevant defendants are named above, were officers of Hope Church.

[2] There is a First Amended Complaint. (CT 716) The essential elements remained the same except the Amended Complaint flesh out the details of the "schism" and allege that the relevant individual defendants were members of the Board of Directors of Hope Church.

actions. The defendants relevant to this action filed answers. (CT 147, 159, 579)

Also in this case, is a Complaint in Intervention regarding an enforcement of a note and personal guarantee. (CT 249, 277, 549) That matter was bifurcated and tried after the trial of the case in chief. (CT 769) This court denied Appellants' motion to consolidate and that case is on an independent appellate schedule. (See Case No. B197229)

Trial was set for and began November 15,2005. (CT 674, 962, 1181) The trial court's ruling was entered March 22, 2006. (CT 972) Judgment for the Plaintiffs and against the Defendants was entered June 13, 2006. (CT 1270) Notice of Entry of Judgment was filed June 15, 2006. (CT 1280)

Appellants' Notice of Appeal was filed June 13, 2006. (CT 1277) Notice of Designation of Record on Appeal was filed July 14, 2006. (CT 1291)

III

STATEMENT OF FACTS

Korean Hope Presbyterian Church ("Hope Church") is a California Corporation, incorporated in 1973. (Exhibits 93 and 94) Reverend Kyung Suh Kim is the president of Hope Church, and has been since 1971. He was elected by the Board of Directors. (RT 606-7) The members of the corporation are the church members. (RT 609, 634) Each member has one vote and is entitled to vote for the directors. (RT 635-6, 1273) The church has regularly noticed congregational

meetings around the 15th day of January each year. (RT 638)

Reverend Kim was first ordained in 1964 in the Korean Presbyterian Church. (RT 602) He came to the United States in September 1965 and initially served as an associate pastor in an United Church. (RT 623) Over time, he served in various roles in the ministry. He taught at a Korean Presbyterian Church of America Seminary, help found the Korean Presbyterian Conference and was its president of the Korean Presbyterian Conference in 1987 (RT 312, 315)

He became the pastor of an independent church, Korean Hope Christian Church in 1971. (RT 312, 324, 625) It was never aligned with a denomination until it joined the Presbyterian Church United States of America ("PCUSA"), wanting to stay independent. (RT 325)

In 1993-1994, several persons, including Mr. and Mrs. Hertig joined Hope Church. The Hertigs became the youth pastors at the church. (RT 961-2, 1284) Other people joined the church, persons who had originally been members of a PCUSA church. (RT 1213) The membership of the church was roughly doubled. (RT 1285) Those new members provided information about the rules of the PCUSA and how it was structured. (RT 1213-15)

In approximately 1995, discussions were held in the various cells of the members of Hope church about joining the PCUSA. (RT 1802-5, 1813) The Elders conducted meetings at different houses to discuss joining the PCUSA and the Presbytery. (RT 1808-9) One of the topics discussed was that Reverend Kim

was possibly holding the church property in his own name. (RT 1813-4, 1826-7)

Another topic of conversation at these meetings was the "property rule" of the PCUSA. (discussed later) (RT 1810-11) People who viewed themselves as knowledgeable would explain the property rule. (RT 1811-12) Certain elders testified it was their belief that once a church joined the Presbytery the church could not sell its property without the Presbytery's permission. (RT 1807)

A congregational meeting held October 15, 1995 after notice had been given to the congregation. (RT 1819-21, 1824) The topic was about Hope Church perhaps joining the PCUSA. (RT 1820) At that meeting, Rev. Kim said that the session had made a decision to join the PCUSA. (RT 1820) There was no discussion about the property rule. (RT 1836)

The general consensus was that it would be a good thing for the church to join the PCUSA. (RT 1215-8, 1218, 1993-5) Some wanted to join PCUSA because there was a rumor that the church property was in Kim's name, it was difficult to recruit youth pastors, there were no rules existing any procedure in the church. (RT 1255) Members, who were members of PCUSA churches in the past gave their opinions of how the church would be run. (RT 1289-90)

Hope Church applied for admission to the PCUSA in October 1995. (RT 326-7, 649, Exhibits 2 and 251) The church provided its session resolution, its Articles of Incorporation and financial information. (RT 333) Reverend Kim thought that when the church joined the PCUSA, it became subject to its constitution. (RT

328-9, 650-1) Yet, even after joining, Hope continued to pay its own bills, including the minister's salary and mortgage with no help from any of the PCUSA's entities. (RT 644-5)

When Hope joined the PCUSA in 1995, Reverend Kim knew PCUSA had a constitution called the Book of Order and that it governed the individual member churches. (RT 947-8, 1217) It was generally understood by members of the church, the PCUSA would have control over the church's property. (RT 1222) Reverend Kim admitted as much. (RT 1291-2) Nonetheless, the bylaws of Hope Church were never amended and in fact, had never been signed. (RT 605, 642, Exhibit 94)

Testimony was adduced from Margaret Wentz, an official in the PCUSA. (RT 1855) She gave her understanding of the governing documents of the denomination. (RT 24[3]) She is the corporate secretary and stated clerk for the Synod of Southern California, a part of the PCUSA. (RT 4)

She described the polity of the PCUSA. It has a written constitution, constituting of the Book of Confession and the Book of Order. (RT 4 Exhibit 1) The Book of Order has three parts: the form of government, the directory of worship, and the rules of discipline. (RT 5)

Important is wording from the Book of Order relating to the relationship of the church to civil authority. It acknowledges that the church is distinct

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[3] As will be discussed, her understanding is not always in conformity with California law.

from the civil government. (Paragraph G1.0307, RT 116) The Book of Order gives deference to the civil authorities. "[T]he governing bodies of the church have no power to impose civil jurisdiction or impose civil penalties." (RT 97) G-9.0102 All power delegated by the Book of Order is merely ministerial and declarative. (RT 96-97) G1.0317.

The PCUSA is organized into hierarchal levels, as set forth in G-9 of the Book of Order. There is one General Assembly and 16 regional entities called Synods. Then there are 173 Presbyteries and then finally below the Presbyteries are the Sessions of the local church. (RT 7) The Session is the governing body of the local church. (RT 95) According to Wentz, the governing structure of the church is that each governing body has authority over the governing body below it. (RT 1847-8) Further, it was her opinion that a church can only sever its ties with the national denomination if the Presbytery allows it. (RT 1588)[4]

All of the entities, the Synod of Southern California and the Hanmi Presbytery are corporations. (RT 1845-6) The Hanmi Presbytery, which Hope ultimately joined, is somewhat unique as it is a non-geographic presbytery temporarily organized for the purposes of assisting the Presbyterian Church in its mission and ministry with Korean immigrants. (RT 10, 1850)

In addition, the various bodies of the Church can delegate authority to "Administrative Commissions." (RT 12, 1846) The duties of the Administrative

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[4] As will be shown, that hierarchal structure is ecclesiastical in nature only.

Commissions are spelled out at the time they are created. (RT 12) When an Administrative Commission is set up to oversee a particular church the authority is created by the governing body. (RT 12-3)

In addition, the Book of Order addresses the issue of a "schism."[5] If a church divides into factions, the Presbytery is to first attempt a reconciliation. (RT 28) If reconciliation does not occur, then the Presbytery has the responsibility of determining which faction is the "true church" and who is entitled to the property. (RT 28, 1850, 1856)

Finally, Wentz testify to the property rule, in particular, the "trust clause." The Book of Order allows churches to own property in their own name. (RT 103) Nonetheless, Chapter 8 of the Book of Order, adopted in 1983, states that all property of the local church is held in trust for the PCUSA. (RT 14-6, 1843), (G-8.0201, Exhibit 1)[6] There is no written documentation given to applicants to PCUSA regarding their obligation to put their property in trust. (RT 85) It is presumed that ministers and elders of the Presbyterian Church are aware of the trust provision. (RT 85)

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[5] "Schism" is an ecclesiastical term of art.

[6] The "Trust Clause" reads as follows: ""All property held by or for a particular church, a presbytery, a synod, the General Assembly, or the Presbyterian Church (USA.), whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of a particular church or of a more inclusive governing body or retained for the production of income, is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.)."

According to Wentz, member churches of the PCUSA are required to accept the constitution as the governing instrument. The "Session" of the local church is the functional equivalent of a board of directors. (RT 18) When a church becomes a member of the PCUSA, the property is transferred into trust pursuant to the Book of Order and the Session has the responsibility to carry out the trust. (RT 18, 27-8) The local church may not encumber a property without the consent of the Presbytery. (RT 25) There is no provision in the Book of Order allowing the local session to withdraw its property from the trust without permission from the Presbytery. (RT 26-7) The PCUSA rule is that a particular church can only leave by a constitutional act of the Presbytery. (RT 1548-9)

In addition to Hope Church joining the PCUSA, Reverend Kim applied for personal admission to the Hanmi Presbytery. (RT 303, Exhibits 3, 4, 5 and 6) As part of the application process, he promised to abide by the rules of the Korean Presbyterian Church. (RT 303)

In 1999, Reverend Kim was named to be the interim moderator and later moderator of the Hanmi Presbytery. He served in that role for two years. (RT 35, 334) As the interim moderator, he was involved in different issues and disputes with Presbyterian ministers and churches, including taking the positions that the Presbytery had ownership interests in local churches' real and personal property and signing verified complaints, on behalf of the Presbytery, against those ministers and churches. (RT 36-37, 44-9, 53-55, 57-58, 60-69, 73, 79, 111-112, 319-23, 334-8, 339-341, 344-60, 950-59).

Hope's property was in the name of Hope Church. (RT 909, 945, Exhibits 15-17) At one point, because the church was going to build a new building, the bank told Reverend Kim he needed to place the property in his name and pledge the church and his home as collateral. (RT 909-910) Reverend Kim asked the bank what he needed to do and was told that he had to obtain the loan in his name and pledge his house as collateral. (RT 909-10) The property was placed in his name and his wife's name from 1990-1992. (RT 90-2, 380-2, 935, 943-5, Exhibit 294) Because of tax exemption issues, the property was transferred back to Hope Church in 1992. (RT 383, 385)

The money to build the church came from Hope Church. (RT 914) Neither the PCUSA nor any of its organizations contributed to the building of the church. (RT 914)

In addition, land was purchased for a parking lot. (RT 915, Exhibit 16). That purchase was financed through a bank loan and a private loan. (RT 915) The PCUSA never assisted in purchasing that property. (RT 916)

After 2001, a group of people led by a Reverend Oh joined the church. Differences occurred and some people left the church. (RT 1264) Some of the congregation wanted Reverend Kim to retire. (RT 636-7) A letter and petition to that effect was sent to the Synod. (RT 1226-7, Exhibit 257) No formal action was taken. (RT 636-7, 902-4) By 2003, Reverend Kim was demanding that the Presbytery exercise its authority under the Book of Order to stop Reverend Oh's activities. (RT 380)

It was thought by some church members that if Reverend Oh became the senior pastor of the church, the original members of Hope Church would be frozen out. (RT 1248) It was thought that by leaving the PCUSA that possibility would be prevented. (RT 1228) A session meeting was held in January 2003 to discuss the potential of the church leaving the PCUSA. (RT 1228, 1247-8) Ultimately, Reverend Kim filed a civil action against Reverend Oh. (RT 611, 971-2, Exhibit 96)

In early 2003, the Presbytery was equivocating about whether to establish an Administrative Commission for Hope Church. (RT 254, 965, 931) The congregation was aware of the potential action by the Presbytery and was afraid they would lose their church if an Administrative Commission was appointed. (RT 971, 966-7) Concerned that Hope was going to lose its property and wanting to protect it, a caravan of church members went to a January 30, 2003 meeting of the Presbytery to protest the actions of the Presbytery. (RT 967, 969-971, 1267, 1271) A petition was submitted by Hope Church. (RT 1520, 1548) In February, the Presbytery voted against forming a Commission. (RT 967, 1580-1)

During that time, Hope Church contemplated leaving the PCUSA. There was a session meeting in January of 2003 where the topic was raised about potentially leaving the PCUSA. (RT 1228) Prior to that meeting Reverend Kim made announcements about the on going dispute between Hope Church and the Presbytery and that the Presbytery was contemplating putting an Administrative Commission in place. (RT 1228-9) The thought in leaving was that the PCUSA

would have no right in the church property. (RT 1229, 1259-60)

In addition, and more importantly, the Board of Directors of Hope Church met prior to that session meeting. (RT 921) At that meeting, the Board unanimously voted to leave the PCUSA and the Board Members signed the required "Written Consent to Action by Board of Directors Without a Meeting." (RT 921-2, 1230, Exhibit 196) There were no dissenting votes at that meeting. (RT 922)

The congregation unanimously signed a similar document approving the disaffiliation with the PCUSA around January 25, 2003. (RT 924-6, Exhibit 8) At that time, there were no conflicts in the congregation of the church nor were there complaints about the manner in which the Board of Directors was running the church. (RT 930, 939) The documents were signed in order to save the church. (RT 1230-1)

On April 6, 2003, Hope Church manifested additional actions which showed that it had left the PCUSA, including a name change and the removal of the PCUSA name from the congregational announcements. (RT 1235-6, Exhibit 243)

It was only later that certain members expressed a desire to remain part of the PCUSA. In December of 2003, a petition was signed by approximately (RT 80) members of the church stating their desire to remain members of the PCUSA. (RT 1238-9, Exhibit 278)

During that time, Reverend Oh complained to the Presbytery that he was unfairly being asked to leave and that his salary was not being paid. (RT 79, 1503)

An investigation by the Presbytery was undertaken. (RT 1503) In addition, by the fall of 2003, the Presbytery and the Synod were beginning to conclude that Hope Church was not carrying out its responsibilities relating to the church property. (RT 1857) After the Board of Directors signed the consent to withdraw and after the members signed the form to withdraw from the PCUSA, the DCUSA contemplated placing an Administrative Commission over Hope Church. (RT 930)

The Synod, now acting as the Administrative Commission for the Hanmi Presbytery,[7] began entertaining thoughts of impaneling an Administrative Commission for Hope Church to deal with the dispute between Reverend Oh and Reverend Kim. (RT 1508, 1510, 1585) As part of the process, records and other documents were requested of Reverend Kim. (RT 1518-20) They were not provided. (RT 1517) By April of 2003, it was perceived that there was a dispute between Reverend Oh's group and Reverend Kim's group. (RT 1582) A determination was going to be made as which group was going to be the "true church." (RT 1582)

On March 25, 2003, the Synod administrative commission acting as the Hanmi Presbytery created a Hope Church Administrative Commission. (RT 42-3, 79-81, 1503-4 Exhibit 265) A document, dated April 16, 2003 reflected that action and "dismissed" the session

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[7] For reasons unknown, in February of 1999, the Synod of Southern California impaneled a administrative commission to oversee the Hanmi Presbytery. (RT 34, 42) According to PCUSA polity, the Administrative Commission took on the responsibilities of the Hanmi Presbytery. (RT 1857-8)

of Hope Church as of March 23, 2003. (RT 1503-4, 1539, Exhibit 81) According to Wentz' reading of the Book of Order, the Commission acted as the session of Hope Church and the Hope Church property became the property of the PCUSA. (RT 1521, 1525)

The Administrative Commission took the position it had not received notice from Hope Church prior to March 23, 2003 that it had left the PCUSA. (RT 81-2, 1506) According to the Administrative Commission, notice was only received when it received an April 1, 2003 letter from Hope Church's attorney notifying them of that fact. (RT 1508-1 509, Exhibit 265) Only after April 16, 2003, by a letter dated April 21, 2003, did the Administrative Commission notify Hope Church's counsel that an Administrative Commission had been established. (RT 1545, 1551-2, Exhibit 269) Neither the Presbytery nor the Synod administrative counsel ever gave consent to Hope Church to withdraw. (RT 82)

The Administrative Commission undertook the responsibility to act as the session of Hope Church. (RT 1858) The moderator of that session was Mark Hong. That session carried out the functions that one would normally associate with a Board of Directors of a company. (RT 1859, 1505, 1507-8) It was a unilateral power with no power remaining with the members of Hope Church or its Board of Directors. (RT 1536, 1545-6)[8] The Administrative Commission's power with

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[8] As part of its process, the Administrative Commission also dissolved the pastoral relationship between Reverend Kim and Hope Church as of February 1,2004. (RT 1514-5, 1537 Exhibits 279 and 280)

respect to property issues was "absolute." (RT 1536, 1540)

Also, during this time, actions were taken by Hope Church in an effort to save the church property. (RT 1253) By authority of the Board, a lease was entered into with a church named True Light. (RT 616, 1253, Exhibits 10 and 32) That was announced to the congregation. (RT 1237-8) Finally, the property was deeded to the Victorville Sarang Church. (RT 619-29, Exhibit 12) Those actions were taken to save the Church and its property from the PCUSA. (RT 620, 947)

As noted above, as part of the process, the Administrative Commission attempted to mediate the dispute between the Reverends Oh and Kim but was unsuccessful. (RT 81) The Administrative Commission was going to decide who was the "true church." (RT 83) In making that determination, the "true church" would always be a group of people who remain loyal to the PCUSA even if it was only one person. (RT 107, 1521-2, 1543) Stated otherwise, there could never be a withdrawal of a church from the PCUSA. (RT 1522)

The predicable choice was made. The "true church" were members who wanted to remain a part of the PCUSA church. (RT 83, 1524)

In February the church applied to join the denomination called United Presbyterian Church in America.

After trial, the lower court issued a ruling. (CT 962) It recognized that Hope Church was a California corporation. It further recognized that Hope Church

was the legal owner of its property. It also recognized that Hope Church voted to disaffiliate from the PCUSA in January of 2003 and that the Administrative Commission was formed in March of 2003.

Nonetheless, the lower court held that Hope Church was subject to the constitution of the PCUSA, including the provision that requires its property to be held in trust for the PCUSA. It further held that as of March 25, 2003, the Administrative Commission had been duly impaneled, and pursuant to the procedures set out in the PCUSA constitution, effectively replaced the Session and Board of Directors of Hope Church and was the only entity authorized to act for and on behalf of Hope Church, a California Corporation. Although title to the property was held in Hope Church's name, the property was held in trust for the PCUSA. The court deferred to the actions of the Administrative Commission, and enjoined the defendants from using the property and interfering with the actions of the Administrative Commission.

That ruling was incorporated into and reduced to a Judgment. (CT 1270). Of interest, the Judgment gave title to the Hanmi Presbytery in fee simple. (CT 1275)

IV

STATEMENT OF APPEALABILITY

Defendants appeal from a judgment that finally disposes of the claims between the parties. (C.C.P. §904.1(a)(1))

ARGUMENT

V

RESPONDENTS FAILED TO MEET THEIR BURDEN IN DEMONSTRATING THAT A TRUST EXISTED IN FAVOR OF THE PCUSA AND THE COURT ERRED IN SO HOLDING

In its Ruling, the lower Court held that a trust in the Hope Church property existed in favor of the PCUSA. (CT 962) While giving lip service to a neutral principles analysis, the court did not recognize Hope Church as an autonomous California corporation, it erroneously did not apply the clear and convincing standard, it failed to properly apply the provisions of *Corporations Code* Section 9142 and it failed to apply the applicable law as set forth in the case of *California-Nevada Annual Conference of the United Methodist Church v. St. Luke's United Methodist Church* (2004) 121 Cal.App.4th 754 ("*St. Luke's*").

Where an internal church dispute involves a question of ownership or control of church property which the civil courts can adjudicate by applying "neutral principles of law, developed for use in all property disputes," the civil court may properly decide the issues in controversy. (*Jones v. Wolf*(1979) 443 US 595, 599-605) ("Wolf")

The starting point for legal analysis is the fact that Hope Church is the legal owner of title to all real property at issue in the present case. (Deeds, Exhibits 14 through 17) This fact gives rise to the presumption set forth in *Evidence Code* section 662. *Evidence Code* section 662 is found in the Article creating

"Presumptions Affecting the Burden of Proof" and reads:

> "The owner of legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof."

Presumptions affecting the burden of proof are established by the Legislature to support legislative policies. In the case of the *Evidence Code* section 662 presumption, the policy is clearly to prevent a separation of ownership and control, unless there is clear and convincing proof that such was the intent.

Another statute likewise limits the Respondents' ability to claim to an interest in Hope Church's real property. That statute is *Corporations Code* section 9142. This statute was amended in pertinent part in 1982 as a change in California law relating to charitable trusts. The Legislative Counsel's Digest identifies the change as follows:

> "Under existing law, gifts to a religious organizations are charitable in nature, and the acceptance of such a gift generally establishes a charitable trust, either for the organization's declared purposes or for some other purpose which may be specified. However, existing law limits the persons who may remedy a breach of trust by a religious corporation.
>
> This bill would provide that no asset of a religious corporation is or shall be deemed to be impressed with any trust unless the asset was received with an express commitment by

resolution of the directors, or unless the articles or bylaws of the corporation or the governing instruments of a superior religious body or general church so provide, or unless the donor expressly imposed a trust in writing at the time of the gift or donation.

The bill also permits the amendment or dissolution of trusts imposed pursuant to articles , bylaws, or governing instruments by amendment to the articles, bylaws, or governing instruments." (Legislative History, CT 988" (Legislative History, CT 988)[9]

The 1982 amendment to *Corporations Code* section 9142 was in keeping with the decision of the court in *Protestant Episcopal Church v. Barker* (1981) 115 Cal. App. 3d 599, 605, which held that pursuant to the First Amendment of the United States Constitution, California did not follow a hierarchical or implied trust theory.

Corporations Code section 9142 provides in part:

"(c) No asset of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law unless one of the following applies:

(1) Unless, and only to the extent that the assets were received by the corporation with an

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[9] The Court is requested to take Judicial Notice of the Legislative History.

express commitment by resolution of its board of directors to so hold those assets in trust.

(2) Unless, and only to the extent that, the articles or bylaws of the corporation, or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide.

(3) Unless and only to the extent that the donor expressly impose a trust, in writing, at the time of the gift or donation."

In short, for Respondents to have prevailed at trial, they must provide clear and convincing proof that their alleged beneficial interest complied with *Corporations Code* section 9142. Section 9142(c), however, is quite clear in its instruction that the evidentiary basis for finding the elements of trust must be evidenced in a writing. For example, each of the three "safe harbor" provisions are effective "only to the extent" that some writing describes the trust. Thus, section 9142 should be read in conjunction with *Evidence Code* section 662 for the conclusion that the trial court was required to disregard any argument made by the Respondents based upon an assumed or implied intent or trust provision; simply put, if the trust was not created by a writing, Respondents cannot argue it existed.

A. Respondents Failed to Provide Clear and Convincing Evidence That the PCUSA Has a Beneficial Interest in Hope Church's Real Property under Corporations Code Section 9142(c).

Respondents cannot find a safe harbor in the provisions of *Corporations Code* section 9142(c)(1). That provision allows the finding of a trust interest only if, and "only to the extent" that, the assets were received by the corporation with an express commitment by resolution of its board of directors to so hold those assets in trust. (Corporations Code §9142(c)(1)) Since the Respondents provided no evidence of any such resolution, they cannot base their claim to a beneficial interest on that provision.

Likewise, Respondents cannot find a "safe harbor" in the provisions of *Corporations Code* section 9142(c)(3) which provides that a beneficial interest may exist only if, and "only to the extent that," the donor expressly imposed a trust in writing at the time of the gift or donation. Respondents presented no evidence that any of the real property was acquired by Hope Church as a gift or donation. In fact, the evidence was to the contrary; each of the grant deeds states that the real property was acquired for "valuable consideration." (See Deeds, Exhibits 14 through 17) Thus, since there was no donation, there was no written document expressing the "donor's" intent to create a trust in favor of the Respondents.

Further, there was no clear and convincing evidence that a trust was created pursuant to *Corporations Code* section 9142(c)(2). That section provides a "safe harbor" "only to the extent" that a

religious corporation's Articles of Incorporation, or bylaws, or the governing instrument of a superior religious body "expressly provide." This "safe harbor" provision was the one relied upon by Respondents and the court. (CT 967)

In finding a trust, the lower court appeared to apply the doctrine of neutral principles and the four general set of facts: (1) the deeds to the property; (2) the bylaws and articles of incorporation of the local church; (3) the constitution of the national church; and (4) relevant state law governing possession and disposition of property. (CT 962 et. seq) It then found a trust because Hope Church joined the PCUSA and therefore, the trust provision in the Book of Order applied. That is legal error in many respects.

First, as noted above, the deeds to the property do not mention any trust. Second, the Articles of Incorporation of Hope Church also do not create a trust. They were filed in 1973 and never were amended to reflect any association with the PCUSA nor did they create a trust. (Exhibit 93)

Third, although as the Book of Order does contain a provision which appears to establish a trust in favor of the PCUSA denomination. (Book of Order G-8.021, Exhibit I), that provision cannot create atrust. To do so would be a finding of a creation of an implied trust, something not permitted by California law.

The burden of producing clear and convincing proof of its trust was on the Respondents. In order to prove the trust, Respondents must show facts supporting the elements of a trust. "In order to constitute a valid trust there must be a competent trustor, an intention on the

part of the trustor to create a trust, a trustee, an estate conveyed to the trustee, an acceptance of the trust by the trustee, a beneficiary, a legal purpose and legal terms." *(Reagh* v. *Kelley* (1970) 10 Cal.App.3d 1082, 1088) *Corporations Code* section 9142 sets a limitation on the kind of evidence that may be used to prove the trust; the trust must be express, and the source of the express language is limited to several enumerated texts, such as a corporate resolution, the articles of incorporation, bylaws or governing text of the denomination.

It is at this point that the presumption in *Evidence Code* section 662 and the requirement that any trust provision be stated expressly come into play. Respondents cannot rely upon an implied creation or acceptance *(Corporations Code* section 9142) and therefore they failed to prove by clear and convincing evidence that there was a trust in favor of the denomination. (*Evidence Code* §662) The case of *Protestant Episcopal Church v. Barker* (1981) 115 Cal.App.3d 599, 605 clearly repudiated any implied trust or hierarchical theory. The 1981 *Barker* decision made it clear that under California law any finding of an implied trust or reliance upon hierarchical theory was inconsistent with California's adherence to the neutral principles approach.

In 1982, the California Legislature enacted amendments to *Corporations Code* section 9142 with the intent of limiting the property of a religious corporation subject to charitable trust. *Corporations Code* section 9142(c) codified the repudiation of the hierarchical theory and implied trust theory by restricting the kinds of ways of writings that can create such trusts.

In short, the legislative intent behind the enactment of section 9142(c) was to limit the universe of charitable trusts. *Corporations Code* section 9142(c) was expressly intended to change the law with respect to eliminating implied charitable trusts. Thus, the Analysis of Senate Bill 1178 prepared for the Assembly Committee on Judiciary stated:

> "Subject
>
> This bill is intended to limit the property of a religious corporation subject to a charitable trust and to clarify rights of members and religious corporations relative to property contributed for a specific purpose."
>
> Digest
>
> Under existing law, the acceptance of gifts to charitable organizations, including religious corporations, generally establishes a charitable trust, either for the organization's declared purposes or for another specified purpose.
>
> This bill would provide that no assets of a religious corporation would be impressed with any trust unless the board of directors, the articles or bylaws, or the written intention of the donor imposed a trust." (Legislative History, CT 1010)

Under Staff Comments, the following observation was made:

> "First Freedom, the sponsor of this bill, states that section one of the bill is intended to "fill a

> void" left by the passage of SB 1493 (Petris), Ch.1324, Statutes of 1980. SB 1493 eliminated the authority of the Attorney General to enforce charitable trusts of religious corporations. This bill would clarify what constitutes a religious corporation charitable trust and would place the definition in Corporations Code Section 9142 which confers standing for breach of trust on the corporation, its officers and directors and persons with a contractual or property interest in the assets subject to trust." (Legislative History, CT 1010-1)

In construing or interpreting a statute, the court's primary objective is to determine the legislative intent of the enactment; all other rules of construction yield to this rule. (*Code of Civil Procedure* §1859; *Laurel Heights Improvement Association v. Regents of UC* (1993) 6 Cal.4th 1112, 1127) When questions as to the applicability or interpretation of statutes are presented to a court, numerous cases have recognized that the controlling issue is the intent of the legislature. (*People v. Jeffers* (1987) 43 Cal.3d 984, 993) The legislative history of the statute as well as the historical circumstances of its enactment may be considered in determining the intent of the legislature. *(Id)* Thus, courts must look beyond the statute's language and inquire into its history for the purpose of ascertaining legislative intend. *(Id)*

In the present case, the clear intent of *Corporations Code* section 9142 was to limit, not expand, the property subject to charitable trust owned by religious corporations.

B. Because the Legislative Intent Was to Limit Religious Property Subject to Charitable Trust, the Legislature Did Not Intend to Reverse Settled California Law regarding the creation of a Trust; A Trust still has to be created by the Settlor, which is Hope Church; a Trust can not be created by a Third Party such as the PCUSA.

California law follows a neutral principle approach to the adjudication of property disputes among religious entities. (See *Protestant Episcopal Church v. Barker, supra,* 115 Cal.App.3d 599, 621) *Barker* followed the United States Supreme Court's decision in *Jones v. Wolf, supra)* Under *Jones v. Wolf, supra,* the court is to analyze the appropriate evidence from a purely secular standpoint. California courts have held that nothing in Corporations Code section 9142 is intended to supplant basic principles of trust law. *(California-Nevada Annual Conference of the United Methodist Church v. St. Luke's United Methodist Church, supra,* 121 Cal.App.4th 754, 767. A trust is created by the manifestation of intention of the settlor to create a trust, trust property, a lawful trust purpose, and an identifiable beneficiary." *(Chang v Redding Bank of Commerce* (1994) 29 Cal.App.4th 673, 684) An express trust is generally created in one of two ways: (1) a declaration of trust by which the owner of property declares that he holds it was trustee for some beneficiary; (2) a transfer in trust, by which the owner transfers to another as trustee for some beneficiary, either by deed or other transfer inter vivos, or by will. (11 Witkin, Summary of Cal. Law (9th Ed. 1990) Trusts, §26(a), p. 911, see also, Probate Code §15200; Rest.2d Trusts, §17)

It is clear that only the settlor can create a trust, which is Hope Church. *(St. Luke's* at p. 768) A third party cannot create a trust in another's property. As the *St. Luke's* court stated at p. 769-770:

> "The plaintiffs' reading of Corporations Code section 9142(c)(2) appears to be that this statute enables a general church to create a trust, in favor of itself, with the trust property being the local church's property. In plaintiffs' view, the general church (or 'superior religious body') can do this by so providing in the general church's 'governing instruments.' Such a statute would appear to be sharply at odds with other general principles of trust law. A trust can be created by a 'declaration by the owner of property that the owner holds the property as trustee.' (Prob. Code §15200, subd. (a); see also, Rest.2dTrusts, §17, p. 49) We know of no principle of trust law stating that a trust can be created by the declaration of a nonowner that the owner holds the property as trustee for the nonowner. A more reasonable reading of the statute is that subdivision (c)(2) was intended to be a codification or recognition of Barker, *supra,* 115 Cal.App,.3d 599. This is especially so since subdivisions (c) and (d) were enacted shortly after Barker waw decided. Barker was decided in January of 1981. Subdivisions (c) and (d) of Corporations Code section 9142 were enacted in 1982, and took effect in 1983. (Stats. 1982, c. 242, p. 784, §1) Nothing in Barker supports the view that a general church can create a trust in favor of itself simply by enacting a rule stating that a local church holds property in trust in favor of the general church. Barker involved

four local churches and one general church. The general church adopted a rule (canon 10.06), which declared that on dissolution of a local church its property became distributable to the general church. The court nevertheless concluded tat no trust in favor of the general church existed for three of the four local church properties. 'At the times the three earlier churches were incorporated and acquired their property, nothing in the general church constitution, canons, and rules operated to create an express trust in local church property in favor of the general church.' (Barker, *supra*, 115 Cal.App.3d at p. 624) These three local churches 'did not subject themselves to express restraints on their property by reason of the constitution, canons, and rules of the general church. (Id. at p. 625) In contrast to this, the fourth local church 'was incorporated subsequent to the adoption of Diocesan Canon 10.06.' (Ibid) This fact, plus language in the fourth local church's articles of incorporation, caused the court to conclude that 'under neutral principles of law the property of [the fourth local church] was subject to an express trust in favor or][the general church. (Id. at p. 625)

The language of subdivision (c) of Corporations Code section 9142 indicates that its purpose was to limit, and not to expand, the circumstances in which the assets of a religious corporation would be 'impressed with any trust, express of implied, statutory or at common law.' (Corp. Code §9142, subd. (c)) This limiting purpose is also apparent from various legislative history materials, such as the 'digest'

> of the Assembly Third Reading of the bill (Sen. Bill No. 1178 (1981-1982) Reg. Sess), which stated in pertinent part: 'The bill's purpose is to limit a religious corporation's property subject to a charitable trust. It requires certain actions to take place in order for a gift of property to be considered a charitable trust.' Although the bill appears to have been concerned primarily with assets of a religious corporation which had been donated to that corporation, subdivision (c) of the statute begins with 'No assets of a religious corporation;' and not with 'No donated assets of a religious corporation.' Nevertheless, nothing in the statute appears to have been intended to create a new kind of trust which had not previously existed."

The court held that the similar book, the Book of Discipline, did not create the trust. Here, also the Book of Order cannot create a trust in another's property. That would be a violation of general trust law.

Merely joining the PCUSA does not create an enforceable trust in favor of the PCUSA. The primary focus of the inquiry into whether a trust exists must be on the intent of the settlor - Hope Church - at the time of the creation of the alleged trust. (See §45 Bogart Trust and Trustees, p. 457, (2d Ed. 1984); Restatement (Second) Trusts, §23; *Presbytery of Beaver-Butler of United Presbyterian Church v. Middlesex Presbyterian Church* 507 P.A. 255, 257, 270 (P.A. 1985)). The court erroneously failed to ascertain that intent. In *Presbytery of Beaver-Butler of United Presbyterian Church v. Middlesex Presbyterian Church, supra,* the court observed as follows:

"The putative settlor in this case was clearly Middlesex. In support of this conclusion we note that the Middlesex Church was not a creation or offshoot of the Central Denomination. Rather, the record establishes that the Middlesex Church was created and incorporated on the local level by members of the parish; and that all property was retained in the corporate name of the local church. Subsequently, when the local body voluntarily affiliated with the UPCUSA's predecessor, there was no express trust in the language of the denomination's constitution. Also it was undisputed that there never was any express trust language in the constitution during the entire period Middlesex remained affiliated with the denomination. In fact a prior attempt by the predecessor's denomination, Circuit 1929, to include express trust language in the constitution was defeated by the member churches.

The denomination here has cited no evidence that Middlesex ever intended to convey their property interest to them. To the contrary, throughout their entire affiliation, Middlesex retained all property in their corporate name. The commonwealth court's reliance on selected passages from the Book of Order was misplaced in that the court ignored the overall intent of the Book as a means of overseeing the spiritual development of member churches. In addition, the selected provisions, which at most evidence the putative trustee's desired interpretation, are far from constituting the clear unequivocal evidence necessary to support a conclusion that a trust existed."

Accordingly, Pennsylvania Supreme Court held that a trust had not been created in the local church's property.

This analysis clearly applies to Hope Church. Hope Church was created by the members of Hope Church; it was not an offshoot of the PCUSA and it was not established by the PCUSA. The property always remained in Hope Church's name. The speculation of the court that there was "inadvertence" in deeding the property over, is not evidence by any substantial evidence. Rather, it flows from the court's *a priori* assumption that a local church must obviously intended to grant property to the so-called hierarchy. That assumption, however, conflicts with California law. (See *Barker, supra,* at p. 605; *St. Luke's, supra*, at p. 770-1) Actual evidence is required to show there was intent to convey the property, the actual evidence must be "clear and convincing", and such evidence was completely missing in the present case.

Further, the intent must be contained in a writing. Since "black letter" trust law applies to the resolution of the issue in the present case, it is Hope's intent - as the owner of the property - that is dispositive. "Black letter" trust law has only been modified by Corporations Code section 9142 insofar as the evidence of the intent must be contained in a writing. Hence, there must be a writing that evidences Hope Church's intent to put its property into a trust in favor of the PCUSA.

There is no evidence of any such writing. All other cases which found a trust have had such writings. In *St. Luke's,* for example, the deeds contained a reference to the existence of a trust in favor of the

UMC. Such evidence is completely missing in the present case. In short, finding in favor of the PCUSA in this case involves a presumption that Hope Church intended to convey its property to the PCUSA based on nothing more than its relationship with the PCUSA. Such a presumption would constitute an unconstitutional establishment of religion and so would be contrary to the Constitution of the United States of America and California law. (See *Protestant Episcopal Church v. Barker, supra)* Such a presumption runs counter to established law concerning the two natures of religious corporations. One nature is civil; the other is spiritual. Hence, according to American jurisprudence:

> "[A] church society, by incorporating, does not lose its existence or become wholly merged into the corporation. The religious corporation and the church, although one may exist within the pale of the other, are in not respect correlated. The objects and interests of the one are moral and spiritual; the other deals exclusively with things temporal and material. Each as a body is entirely independent and free from any direct control or interference from the other." (66 Am Jur.2d Religious Society's 5 (2005))

In making its legal decisions, California law requires that the integrity and separate legal existence of the corporation be respected. *(St. Luke's, supra; Protestant Episcopal Church v. Barker, supra)* Hence, having Hope Church's legal rights and property ownership rise and fall based on the court's reading of the Book of Order confuses and reduces the corporate legal entity's existence to that of the spiritual entity. Worse still, the court's ruling uses State power to

enforce a spiritual document on a California corporate entity. As Pennsylvania Supreme Court in *Presbytery of Beaver-Butler* noted, the "overall intent" of the Book of Order is to "oversee the spiritual development of member churches." Likewise, as *Protestant Episcopal Church v. Barker* noted, there is nothing permanent about a church's intent to associate with a denomination. *(Protestant Episcopal Church v. Barker, supra)* Accordingly, the trial court should be reversed because there was no substantial evidence supporting its conclusion of either the intent of the church to convey its property to the PCUSA or of the requisite writing that conveyed such an intent. Further, the trial court's ruling should be reversed because the ruling would constitute an impermissible establishment of religion.

VI

AS A MATTER OF LAW, HOPE CHURCH HAD THE POWER TO LEAVE THE PCUSA, AND ONCE IT HAD DONE SO, THE PCUSA DID NOT HAVE THE SECULAR POWER OVER HOPE CHURCH

It is clear the assertions made by Margaret Wentz who testified the PCUSA was a hierarchal church and once Hope Church joined the PCUSA, it was forever bound and could not leave (RT 1580) are wrong. The law is to the contrary. The courts have ruled that notions of hierarchy are ecclesiastical only and the doctrinal rules or a church do not play a part in "neutral principles" involving civil matters of churches. (See *Protestant Episcopal Church v. Barker, supra,* 115 Cal.App.3d 599, 614. In addition, contrary to the testimony of Wentz that once a church joins the

PCUSA it is forever wedded, the *Barker* Court held at pages 622-3:

> "The articles of St. Matthias, incorporated in 1910, authorize the corporation to acquire and hold church property, but say nothing about disposition of church property on dissolution of the corporation or on disaffiliation from the Dioceses and PECUSA. The articles of St. Mary's, incorporated in 1930, and the articles of Our Saviour, incorporated in 1944, follow the same general form. Nothing which would create an express trust for the benefit of the Diocese and PECUSA appears in any of these articles. However, each of the articles of these three churches declares in substance that the constitution, canons, and discipline of PECUSA and the Diocese shall always form part of the articles of incorporation and prevail against anything repugnant. Such declarations are a far cry from an express trust in church property for the benefit of the Diocese and PECUSA. Nor, did either the Diocese or PECUSA, on the various dates of these incorporations, have any existing provisions in its rules for disposition of local church property on dissolution or disaffiliation of a local church. Plaintiffs-respondents interpret these general provisions in the articles of incorporation as a kind of open ended agreement by the local churches to accept in advance any and all rules and regulations which might thereafter be put in effect by the general church, we do not believe such an interpretation accords with real property law, with contract law, with corporate law, or with trust law. Such declarations or affiliation and

> loyalty are nothing more than expressions of present intention. We think such declarations no more restrictive of future amendments to the articles of incorporation than would be similar statements in an automobile dealer's articles that it would always distribute General Motors products and always be bound by General Motors rules and policies, or statements in a political club's articles that it would forever support the Democratic Party and be forever bound by the latter's rules and platform. A subsequent switch of affiliation by the dealer to Ford, or by the political club to the Republican Party, would, under neutral principles of law, furnish no basis for a claim of express trust by the superseded automobile manufacturer to possession of the dealer's showroom and repair shop or a claim by the deserted political party to possession of the political club's meeting premises and bank account. As in matrimony, *always* and *forever* do not preclude a change in heart and do not create an express trust in another's property. Under neutral principles of law no express trust was created by the articles of incorporation of the three churches incorporated prior to 1958."

Thus it can be seen that Hope Church was entitled to withdraw from the PCUSA.

It should be affirmed again that Hope Church is an autonomous corporation, incorporated under the laws of the State of California. As such, neutral principles permit it to govern itself. It should be further noted that corporate formalities were followed in Hope Church leaving the PCUSA.

Hope Church took corporate action to disaffiliate from the PCUSA. (RT 921-2, 924-6, 1230, Exhibits 8 and 196) That corporate governance is to be analyzed under neutral principles of corporate law. *(Korean United Presbyterian v. Presbytery of the Pacific* (1991) 230 Cal.App.3d 480, 503 (disapproved in part on other grounds in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725))

In the instant case, Hope Church was permitted to do what it did. It is a separate corporation. The Board of Directors and the Congregation took the corporate action to disaffiliate. To the extent that respondents claim that "corporate formalities" were not followed, it need only to be pointed out that respondents are third parties relative to Hope Church and therefore, are not permitted to challenge the actions of Hope Church. The law is clear that a corporate outsider cannot challenge a corporation's management or control. Only a shareholder, officer or director has standing to do so. *(Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1082; see also, 9 Witkin, Summary of Cal. Law (9th Ed. 1989) Corporations §127, p. 626) As Corporations Code section 208(n) notes:

> "[N]o limitation upon the business, purposes or powers of the corporation or upon the powers of the shareholders, officers or directors, for the manner of exercise of such powers' contained in the articles may be asserted 'as between the corporation or any shareholder and any third person.'"

Despite the claim of the Administrative Commission that it did not receive timely notice of the

disaffiliation, the facts are clear that Hope Church disaffiliated (January of 2003) before the Administrative Commission was created (March 25, 2003). (RT 42-3, 79-81, 921-2, 1230, 1230, Exhibits 196 and 265) Furthermore, notice of disaffiliation was provided by Hope Church prior to the Administrative Commission giving notice of its creation. (RT 1508-9, 1545, 1551-2, Exhibits 265 and 269) What is good for the goose is good for the gander. The notion of fair play and equal dignity should apply and if the act is controlling, Hope Church prevailed, and if notice is controlling, Hope Church similarly prevailed.

Respondents will probably also argue that their actions were permitted by the Book of Order control and under its polity, they should be able to do what it did in taking over Hope Church. Yet, The Book of Order expressly states that it is subservient to civil law. (RT 97)

The Book of Order is part ecclesiastical and part civil. Hope Church defers to the ruling of the Administrative Commission to the extent that the Administrative Council took over the "ecclesiastical" portion of Hope Church. The Administrative Commission is probably entitled to do so and the court will not interfere. The "church" may have been taken over but the corporation was not.

However, to allow the Book of Order to control and the Administrative Commission to become a civil authority is to usurp California civil law. As the *St. Luke's* case held at pages 771-2:

> "We acknowledge that our decision in this case appears to be at odds with the Second Appellate

District' recent opinion in *Guardian Angel Polish Nat. Catholic Church of Los Angeles, Inc. V. Grotnik* (2004) 118 Cal.App.4th 919 [13 Cal.Rptr. 3d 552]. In *Guardian Angel* the Board of Directors of the local church 'noted ... to sever all ties with' the general church. *(Id.* at p. 926) The trial court found that the church property belong to the local church. The court of appeal reversed. The appellate court relied upon provisions of the general church's constitution to conclude that acts of the local church's board were 'unauthorized and consequently a nullity' because the general church's constitution required 'diocesan approval of its [the local church's board's] election' and there had been no such diocesan approval. *(Id.* at p. 927) The appellate court then cited the four Barker factors (deeds, articles of incorporation of the local church, rules of the general church, and relevant state statutes, if any), stated that it was applying neutral principles of law, and then concluded that the property belonged to the general church because provisions of the constitution of the general church called for this result. *(Guardian Angel Polish Nat. Catholic Church of Los Angeles, Inc. v. Grotnick, supra,* 118 Cal.App. 4th at pp. 930-931) The *Guardian Angel* court also state that it was relying on the local church's bylaws calling for this result (id at p. 931), but this was only after the court concluded that the board of directors' repeal of those same bylaws had been ineffectual because the board itself had not been approved by the diocese as required by the general church's constitution. (Id. at pp. 926-927)

A general church may certainly view a local church's Board of Directors as being 'unauthorized' and not in compliance with the general church's rules. This is an ecclesiastical matter, and not a matter with which a civil court would interfere. *(Jones v. Wolf, supra,* 443 U.S. 595) But we respectfully disagree with the view that acts of a board of directors of a lawfully formed corporation may be viewed by a civil court to be a nullity simply because those acts are deemed unauthorized not by any recognized rule of state law, but rather only by the general church's own rules. In *Barker,* the court stated: 'Essentially, the hierarchical theory subordinates civil control of church property to ecclesiastical control of church property. Under this theory, the canons and rules of a general church override general principles of legal title in the resolution of church controversies over property.' *(Barker, supra,* 115 CalApp.3d at p. 612) Although the hierarchical theory has supposedly been rejected in California, it will nevertheless live on under the label of 'neutral principles of law,' if a church's own rules are viewed as trumping state statutes."

It is further anticipated that respondents will argue that *St. Luke's* should not be the law, and instead the law should follow the principles set forth in *Concord Christian Center v. Open Bible Standard Church* (2005) 132 Cal.App.4th 136, *Guardian Angel Polish Nat. Catholic Church of Los Angeles, Inc. v. Grotnick,* (2004) 118 Cal.App.4th 919)

First, those cases are easily distinguishable as they all involved the existence of schisms prior to the disaffiliation. Where a schisms is involved, the courts will normally defer to the ruling of the denomination. Here, although a schism was determined by the local church, that determination was only made by the denomination after Hope Church had disaffiliated from the PCUSA.

Second, if the courts give deference to the internal rules of the denomination, the courts are placed in dire jeopardy of being embroiled in ecclesiastical matters. The approach taken by the *St. Luke's* case is the more prudent course, as it provides a "bright line" and prevents courts from stepping over that line and becoming the arm of a church. Avoiding that danger is a true application of neutral principles.

The trial court's reliance on *Guardian Angel Polish National Catholic Church v Grotnik, supra,* 118 Cal.App.4th 919 is equally misplaced. In *Guardian Angel,* the local church's articles of incorporation expressly incorporated the constitution of the Polish National Catholic Church. Accordingly, that constitution became "part of the bylaws" of the local church. In the present case, to the contrary, no such incorporation occurred. (See Exhibits 93 and 94)

Likewise, *Concord Christian Center v. Open Bible Standards Church, supra,* 132 Cal.App.4th 136 is distinguishable. Again, in that case there was an explicit incorporation of the denomination's constitution into the bylaws of the local church by explicit reference. No such explicit reference exists in the present case. The absence of that reference is that Hope Church did not intend to convey its property to

the PCUSA; the absence of that writing in light of Evidence Code section 662 can only allow the conclusion that there was no such intent.

Finally, relying on either *Concord* or *Guardian Angel* in the present case would constitute a violation of the First Amendment and a departure from established California law. *(St. Luke's, supra* at 771) Hierarchical theory has been repudiated in California. Applying *Guardian Angel* or *Concord Christian* in the present case, outside of the clearest expression of an intent to convey property, would revive the hierarchical theory and bring along with it the specter of an establishment of religion.

VII

APPELLANTS WERE DENIED DUE PROCESS AS THERE WAS NO RIGHT TO BE HEARD AS REQUIRED BY THE BOOK OF ORDER

It is clear that Appellants were not notified that the PCUSA intended to convene an Administrative Commission. Hope Church was only informed of that action after the act was done, and after Hope Church had disaffiliated from the PCUSA. (RT 1508-9, 1545, 1551-2, Exhibits 265 and 269)

Appellants were denied due process even under PCUSA rules. Hope Church owns the property which was taken away under dubious authority, and not under California law. Those property interests invoke protection of the Court. See *Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church* (1952) 39 Cal.2d 121, 131 "As long as civil or property rights are involved, the courts will entertain jurisdiction of

controversies in religious bodies although some ecclesiastical matters are incidently involved." *(Providence Baptist Church v. Superior Court* (1952) 40 Cal.2d 55, 60)

The Book of Order is Exhibit 1. Paragraph G-9.0505b of the Book of Order reads as follows:

> "When an administrative commission has been appointed to settle differences within a church, a governing body, or an organization of the church, it shall, before making its final decision, afford to all persons to be affected by the decision fair notice and an opportunity to be heard on the matters at issue. (See G-9.0503a(4), a(6), G-9.0505b-d) Fair notice shall consist of a short and plain statement of the matters at issue as identified by the commission and of the time and place for a hearing upon the matters at issue. The hearing shall include at least an opportunity for all persons in interest to have their position on the matters at issue stated orally. In its absolute discretion, a commission may give the required notice only to responsible representatives of persons aligned in interest and may require the oral statements of position to be made at the hearing by the same or other responsible representatives."

Here, Respondents did not even follow its own rules. There was no opportunity for Hope Church to present its case. The act of taking over Hope Church was null and void.

VIII

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court reversed the judgment and enter judgment for Appellants.

May 15, 2003

/s/
Randall M. Penner, attorney for Appellants Korean Hope Christian Church, Kyung Suh Kim, Bong Duck Cha, Jong Min Tae, Chun Yoll Kim, and Chung Sook Kim

[CERTIFICATE OF WORD COUNT AND PROOF OF SERVICE OMITTED IN THIS APPENDIX]

APPENDIX B

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

CASE NO. B191806

[Filed November 26, 2007]

SYNOD OF SOUTHERN CALIFORNIA AND HAWAII, etc., et al.	)
Plaintiffs and Respondents,	)
-vs-	)
KYUNG SUH KIM, et al.,	)
Defendants and Appellants.	)

Appeal from the Superior Court of California
County of Los Angeles
Case No. BC308786
The Honorable Lee Smalley Edmon

APPELLANT'S REPLY BRIEF

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Defendants and Appellants Korean Hope Christian Church, Kyung Suh Kim, Bong Duck Cha, Jong Min Tae, Chun Yoll Kim, and Chung Sook Kim ("Appellants" or "Hope Church") submits the following as their Reply Brief.

I

INTRODUCTION

The essential flaws in Respondents' argument are three. First, it focuses on the activity of Reverend Kim but his history and actions are irrelevant. It is the actions of Hope Church, as an autonomous California corporation that matter, and that California corporation voted to disaffiliate. Further, a third party cannot challenge whether that entity followed its own rules; they lack standing to challenge the actions of an autonomous corporation.

Second, Respondents ignore the fact that a trust was never created by Hope Church, the legal owner of its property, and the only one who can create a trust in its property. The law is clear a third party cannot create a trust in property of another.

Third, the creation of the Administrative Commission had no force or effect as Hope Church had effectively withdrawn from the PCUSA and therefore the Administrative Commission had no legal right to take over Hope Church. Respondents ignore that Hope Church disaffiliated from the PCUSA before the PCUSA purportedly asserted "control" over Hope Church. That removes any "power" of the Respondents to assert any legal control over Hope Church, even if that control ever existed under California law.

In California, neutral principles of law are the guiding force in trust, property and corporate matters involving churches. "Deference" is only used when the matter is a pure ecclesiastical issue. As will be shown below, doing otherwise puts the courts at risk at being the enforcing arm of the denominations, causing a violation of the First Amendment. Applying neutral principles here requires reversal of the judgment.

II

NO TRUST WAS EVER CREATED

California law has *never* allowed for the imposition of an involuntary irrevocable trust, as urged by Respondents., and to the contrary, has consistently held that real property cannot be transferred into a trust except by a written instrument. (Cal.Civ.Code §1624, 1627; *Protestant Episcopal Church v. Barker* (1981) 115 Cal.App.3d 599.) The statute of frauds has always prohibited parol evidence to evidence the transfer of title to real property to contradict a writing.

The starting point in any property dispute is the statutory presumption that property belongs to the party in whose name title is held, absent clear and convincing contrary evidence. (Cal. Evid. Code § 662; Civ. Code § 1105.) Here, Respondents have not overcome that presumption. The deeds in the instant case are in the name of Hope Church. As well, the Articles of Incorporation of Hope Church have not created a trust; they do not state or create any express trust over the property of the Corporation. Respondents do not dispute those facts.

III

CORPORATIONS CODE SECTION 9142(a) DOES NOT AUTHORIZE DENOMINATIONS TO CREATE TRUSTS IN THEIR FAVOR OVER PROPERTY THEY DO NOT OWN

Nor is a trust created by the Book of Order, a document created by a third party. Corporations Code Section 9142(a) does not authorize religious denominations to unilaterally create trusts over property they do not own. Under *Barker*, *supra*, and *California-Nevada Annual Conference of the United Methodist Church v. St. Luke's United Methodist Church* (2004) 121 Cal.App.4th 754 ("*St. Luke's*"), a denomination's unilateral enactment of a "trust rule" is not legally cognizable. *(St. Luke's*, 121 Cal.App.4th at 757 [California law "does not authorize a general church to create a trust interest for itself in property owned by a local church simply by issuing a rule declaring that such a trust exists."].) No legal principle permits a putative beneficiary to create a trust in its own favor. Rather, "[a] trust is created only if the settlor properly manifests an intention to create a trust." (Cal. Prob. Code § 15201 ; see *Id.*, § 15200 [trust created by property's owner so declaring or transferring property] .) The settlor must clearly and unambiguously manifest an intent to create a trust, and "words of desire, hope or recommendation that a devisee use the property for the benefit of another do not create a trst. The direction must be imperative." (13 Witkin, Summary of Cal. Law (2005) Trusts, §33 .) The Book of Order never created a trust to benefit the PCUSA.

Section 9142(a) of the Corporations Code provides that "[n]o assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law . . . [u]nless, and only to the extent that, the articles or bylaws of the corporation, or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide. (Cal. Corp. Code §9142(a).)

The plain language of the statute, its legislative history, and basic principles of trust and property law, support the conclusion that this statute merely provides a minimum evidentiary floor of facts which must be present before the assets of a religious corporation may be deemed impressed with a trust. There is no support in the language, legislative history, or related areas of law, for the notion that section 9142(a) would authorize a general church to create a trust interest for itself in property owned by a local church simply by issuing a rule declaring that such a trust exists. (See *St. Luke's*, 121 Cal.App.4th at 757 [holding that section 9142(a) does not so authorize].)

The plain language of section 9142(a) is phrased not as a positive declaration, but as a negative conditional: "No assets . . . shall be deemed . . . unless . . . and only to the extent that . . ." The plain language does not say, "If a trust rule is present, then a trust exists," but rather "No trust will exist, unless a trust rule is present." Logically speaking, the statute is not, "If X, then Y," but rather, "No X, unless Y." The latter is fundamentally different than the former, because it does not exclude the possibility that other conditions – such as the local church's express consent to the rule

– are required before a trust is created. In fact, such a reading properly gives effect to all of the language of the statute.

Nothing in the legislative history supports the "presumption" hypothesized in *Korean United Presbyterian Church v. Presbytery of the Pacific* (1991) 230 Cal.App.3d 480, 507-8 and cited by Respondents, that local church property is held in trust if a denomination unilaterally enacts an internal trust rule. Rather, every indication in the legislative history is that the Legislature's intent was to limit the circumstances under which a local church's property would be subject to a trust.

The statute must harmonize with other basic principles of trust and property law. Courts cannot "construe statutes in isolation, but rather [must] read every statute with reference to the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness . . . [They must] choose the construction that comports most closely with the Legislature's apparent intent, endeavoring to promote rather than defeat the statute's general purpose, and avoiding a construction that would lead to absurd consequences." (*Smith v. Superior Ct.* (2006) 39 Cal.4th 77, 83 [citations omitted; internal quotations omitted].)

The interpretation of section 9142(a) advanced by the *St. Luke's* decision harmonizes the statute with other basic principles of trust and property law – foremost among them the axiom that only the owner of property may create a trust with respect to it. "A trust can be created by a 'declaration by the owner of property that the owner holds the property as trustee.'

We know of no principle of trust law stating that a trust can be created by the declaration of a nonowner that the owner holds the property as trustee for the nonowner." (*St. Luke's*, 121 Cal.App.4th at 769, citing Cal. Prob. Code § 15200(a) and Restatement 2d (Trusts), § 17.) Respondents' attempts to distinguish *St. Luke's* are to no avail. First, as noted above, no "schism" existed in Hope Church at the time of the vote to disaffiliate. Further, ignoring for the moment the problems with defining "schism"[1] there was never an official finding that a "schism" existed which would possibly trigger an ecclesiastical determination.

Second, the mandatory in the Methodist Book of Discipline requiring trust language in deeds and the more permissive language in the Book of Order is a distinction without a difference. The holding of *St. Luke's*, in part, was whether the local church manifested an intent, in writing, to create a trust. *St. Luke's* had that language in some of its deeds. Here, Hope Church has nothing in writing showing its intent to create a trust and merely joining the PCUSA is insufficient. The Book of Order by itself cannot create a trust as it is not a written intention by the settlor.

Reading section 9142(a) as Respondents do would radically remake the law of trusts in California, and by implication at that. Such a reading is disfavored. Given this plain language, legislative history, and

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[1] "Schism" should only be used to define an ecclesiastical difference between two factions in a church which may allow a "higher" body to take control, but only in a ecclesiastical way. "Schism" does not translate into a license for a religious body to take civil authority over the property of a church or to take over a Board of Directors of a California corporation.

basic axioms of law, this Court should hold that section 9142(a) does not authorize a religious denomination to create trusts in its favor over property it does not own, but rather establishes a minimum evidentiary floor which must be present before any trust can be found in church property. Therefore, contrary to Respondents' assertions, the Book of Order did not create a trust interest in property owned by Hope Church. A third party cannot create a trust in the property of another.

IV

HOPE CHURCH ACTED AS A CORPORATION AND ITS DISAFFILIATION FROM THE PCUSA MUST BE HONORED

It is undisputed that the Boa. d of Directors of Hope Church unanimously voted to leave the PCUSA and the Board members signed the required "Written Consent to Action by Board of Directors Without a Meeting." (RT 921-2, 1230, Exhibit 106.) The congregation unanimously concurred in writing. (RT 924-6, Exhibit 8.) Hope Church manifested other indications that it had left the PCUSA. (RT930, 939, 1235-6, Exhibit 243.)

Again, it must be emphasized that Hope Church is an autonomous California corporation and has the right to exercise its own corporate governance which is analyzed by neutral principles of corporate law. (*Korean United Presbyterian v. Presbytery of the Pacific*, *supra*, 230 Cal.App 3d 480, 503, disapproved in part on other grounds in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725.) That is what it did and corporate outsiders, such as Respondents,

have no right to challenge those actions; only shareholders, officers or directors have standing to do so. (*Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1082.)

More importantly, Hope Church acted as a corporation. The Board of Directors of Hope Church met and unanimously voted to leave the PCUSA. There were no dissenting votes at that meeting. (RT 922.) The Board Members signed the required "Written Consent to Action by Board of Directors Without a Meeting." (RT 921-2, 1230, Exhibit 196.) The congregation unanimously signed a similar document approving the disaffiliation with the PCUSA around January 25, 2003. And the church manifested other signs of disaffiliation. (RT 924-6, 1235-6, Exhibits 8, 243.)

Respondents' ad hominem attack on Reverend Kim should be ignored by this Court. Respondents spend an inordinate amount of time and effort describing Reverend Kim's history in the PCUSA and his knowledge of the trust clause. They also delight in "demonizing" Reverend Kim, arguing that he treated the church as his own[2] and then impliedly argue that those actions dissipate the application of corporate law and therefore their rules should apply.

That is not the law. The actions of Reverend Kim do not matter. It is only the actions of the corporation

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[2] It is respectfully submitted that those actions are more a function of the culture of the Korean community where authority is more respected.

that matter. The votes were unanimous and the proper documents were signed. The fact of unanimity show there was no "schism." Corporations are legally recognized entities and have the right to chart their own course. Hope Church did so; it chose to disaffiliate from the PCUSA. It took the appropriate steps pursuant to the Corporation Code. Under neutral principles of corporate law, that decision must be honored.

V

JOINING THE PCUSA IS NOT PERMANENT AND CAN BE REVOKED

Joining the PCUSA does not result in involuntary servitude. Contrary to the assertions of the PCUSA that joining the denomination constitutes a forever wedded relationship, the *Barker* Court held at pages 622-3:

> "Plaintiffs-respondents interpret these general provisions in the articles of incorporation as a kind of open ended agreement by the local churches to accept in advance any and all rules and regulations which might thereafter be put in effect by the general church, we do not believe such an interpretation accords with real property law, with contract law, with corporate law, or with trust law. Such declarations or affiliation and loyalty are nothing more than expressions of present intention. We think such declarations are no more restrictive of future amendments to the articles of incorporation than would be similar statements in an automobile dealer's articles that it would always

> distribute General Motors products and always be bound by General Motors rules and policies, or statements in a political club's articles that it would forever support the Democratic Party and be forever bound by the latter's rules and platform. A subsequent switch of affiliation by the dealer to Ford, or by the political club to the Republican Party, would, under neutral principles of law, furnish no basis for a claim of express trust by the superseded automobile manufacturer to possession of the dealer's showroom and repair shop or a claim by the deserted political party to possession of the political club's meeting premises and bank account. As in matrimony, *always* and *forever* do not preclude a change in heart and do not create an express trust in another's property. Under neutral principles of law no express trust was created by the articles of incorporation of the three churches incorporated prior to 1958."

The lengthy recitation of the facts relative to Hope Church's relation with the PCUSA does not change that analysis. At one point, Hope Church had stated a present intention of fealty but for its own reasons, decided to change its mind; neutral principles of California law respects freedoms of choice and association. Hope Church, as a California corporation, was and is entitled to withdraw.

VI

NO DEFERENCE SHOULD BE MADE TO THE ADMINISTRATIVE COMMISSION

Respondent also contend that Hope Church was taken over by the Administrative Commission and argues that corporate power of Hope Church was assumed by that Commission. Due process and timing defeats that position. The corporate action by Hope Church in disaffiliating pre-dated the "take over" by the Administrative Commission. (January, 2003 v. March 25, 2003 .) (RT 42-3, 79-81, 1503-4 Exhibit 265.)

Notice also favors Hope Church. The Administrative Commission claims it only received notice from Hope Church on April 1, 2003. (RT 81-2, 1506-9, Exhibit 265.) However, the Administrative Commission's notice to Hope Church was on April 16, 2003. (RT 1508-1509, 1545, 1551-2, Exhibits 265, 269.)

Whether it is internal corporate action being determinative, or whether notice is the determinative factor, Hope Church prevails. It is axiomatic that for one who seeks justice one must also do justice. If Respondents think all of the rules must be strictly followed, they must follow the same rules. The case of *Concord Christian Center v. Open Bible Standard Churches* (2005) 132 Cal.App.4th 136 affords them no relief. Even accepting the holding of that case for the moment[3] it is distinguishable. In that case, the "higher

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[3] *Concord Christian* never addressed the law that a corporate outsider has no standing to challenge the actions of a corporation. Furthermore, Concord Christian is an example of the "Hierarchy

authority" took over before the local church took action. Here, by contrast, Hope Church took its corporate actions first.

In addition and as importantly, deferring to an Administrative Commission, as Respondents would like this Court to do, is to invite legal error. It is the resurrection of the Hierarchy Rule which has been disavowed by the Courts. (See *St. Luke's*). The Courts are clear that deference should only be given to cases that turn on religious doctrine, discipline or polity, and not property disputes, trusts or corporate action. Deference should only be applied when a suit directly challenges or cannot be resolved without deciding a religious question, i.e., "questions of discipline, or of faith or of ecclesiastical rule, custom, or law."

For example, denominations facing a church disaffiliation often purport to remove and replace the local religious corporation's board or disenfranchise its members under the guise of a "doctrinal" determination. But there is no need for courts to take sides as to such maneuvers to resolve the property issues. To determine whether any "deference" is needed, "[t]he relevant inquiry must be whether the court can resolve the property dispute on the basis of neutral principles of law which do not involve the resolution by the court of ecclesiastical issues . . ." (*Presbytery of Riverside*, 89 Cal.App.3d at 923 [emphasis added].)

Rule" being enforced by the Courts, which translates into the Courts becoming the enforcement arm of the denominations, a clear First Amendment violation.

The better approach is to ignore such self-serving "determinations" entirely when a dispute can be resolved by "neutral principles." Thus, *Presbytery of Riverside* paid no attention to the denomination's claim to have "suspended" the local church's leadership after the disaffiliation. (*Presbytery of Riverside*, 89 Cal.App.3d at 924.) Recognizing that creeping religious entanglement posed by this tactic, the Fifth District Court of Appeal refused to let that occur:

> "A general church may certainly view a local church's board of directors as being 'unauthorized' and not in compliance with the general church's rules. This is an ecclesiastical matter, and not a matter with which a civil court would interfere. But we respectfully disagree with the view that acts of a board of directors of a lawfully formed corporation may be viewed by a civil court to be a nullity simply because those acts are deemed unauthorized not by any recognized rule of state law, but rather only by the general church's own rules." (*St. Luke's*, 121 Cal.App.4th at 771.)

All of the cases which are deferring to the denominations' rules are not applying neutral principles but instead are acting as the legal arm of the church carrying out their wishes. That runs afoul of the First Amendment. The courts should not act as the enforcers of the will of denominational religious hierarchies. The "deference" rule has no application to property disputes, trust disputes or corporation disputes which can be resolved by "neutral principles of law."

VII

FOLLOWING NEUTRAL PRINCIPLES AVOIDS INFRINGING ON THE FIRST AMENDMENT

One of the fundamental rules of statutory interpretation is that unconstitutional and even constitutionally questionable interpretations are to be avoided. (*Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, 43.) Allowing a religious non-owner of property to settle a trust over property it does not own, and without consideration, something unprecedented in California law, or allowing a non-owner of a corporation to take over that corporation, without following the provisions of the Corporation Code, and instead using its own rules is a power greater than even eminent domain. (U.S. Const., Amend. V ["Nor shall private property be taken for public use, without just compensation."].)

By providing religious denominations with such a unique and far-reaching power, such a constructions of section 9142(a) and corporate usurpation would violate the First Amendment's prohibition on establishment of religion and the Fourteenth Amendment's guarantee of equal protection.[4] It would statutorily confer on certain "superior [religious] bod[ies] or general church[es]" having the power to enact "governing instruments" (i.e., those determined to be "hierarchical" by the courts) the unique power to

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[4] U.S. Const., Amend. I ["'Congress shall make no law respecting an establishment of religion . . ."]. US. Const., Amend. XIV, §1 ["No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."]

unilaterally create trusts over property they do not own, without the express consent of the owner and allow those bodies to make their own rules to take over corporations, without paying deference to the laws of the State of California.

This specially conferred power prefers certain religious denominations over all other actors in the civil law arena. Such a "statute . . . that solely benefits religion would be unconstitutional." (Rena M. Bila, Note: The Establishment Clause: A Constitutional Permission Slip for Religion in Public Education, 60 Brooklyn L. Rev. 1535, 1576 (1995).)

But the constitutional problems do not end there. Such a reading of Corporation Code section 9142(a), for example, simultaneously deprives religious corporations affiliated with larger organizations, and their members, of the rights held by all other, non-religious, property owners. Such an interpretation would unconstitutionally advance religion by preferring certain churches over others in enabling them to settle trusts in their favor without conforming to the normal mandates of property and trust law. So interpreted, section 9142 would violate the rule that a statute must not have a "principal or primary effect" of "advanc[ing]" or "inhibit[ing] religion." *(Lemon v. Kurtzman* (1971) 403 U.S. 602, 613.) Further, interpreted in this manner, the statute violates equal protection by depriving local churches (affiliated with larger organizations) of the property rights enjoyed by all other nonprofit entities.

The same analysis is true for corporate law. Corporations are held under the law to be autonomous entities which have rights of self-governance. To allow

another entity to have take-over rules that ignore the Corporation Code, and in fact, circumvent them would be to favor religion, a clear constitutional violation.

The United States Supreme Court held in *Jones v. Wolf* (1979) 43 U.S. 595:

> "The primary advantages of the neutral-principle approach are that it is completely secular in operation, an yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *(Jones v. Wolf, Id.)*

Applying neutral principles of trust, property, and corporate law in the pure and correct manner avoids constitutional error. That is what should be done in the instant case.

VIII

THERE WERE NO JUDICIAL ADMISSIONS

The admissions must be made in pleadings in the current litigation. *(Fuentes v. Tucker* (1947) 31 Cal.2d 1, 5.) Here, the matters Respondents point to are matters, not in the instant action, but, instead other litigation. (Exhibit 97.) Pleadings from other litigation are not judicial admissions. *(Nungaray v. Pleasant Valley Lima Bean Growers & Warehouse Ass'n* (1956)

142 Cal.App.2d 653, 667.) The doctrine of judicial admission should not apply.

IX

CONCLUSION

Hope Church acted as a corporate entity and disaffiliated from the PCUSA. Respondents cannot challenge those actions as they are third parties who have no standing. No trust were created as there were no sufficient writings by the settlor creating a trust; a trust cannot be created by a third party. It is respectfully submitted that the judgment be reversed.

November 21, 2007

PENNER, BRADLEY & BUETTNER

/s/_____
Randall M. Penner, attorney for Appellants Korean Hope Christian Church, Kyung Suh Kim, Bong Duck Cha, Jong Min Tae, Chun Yoll Kim, and Chung Sook Kim

[CERTIFICATE OF WORD COUNT AND PROOF OF SERVICE OMITTED IN THIS APPENDIX]